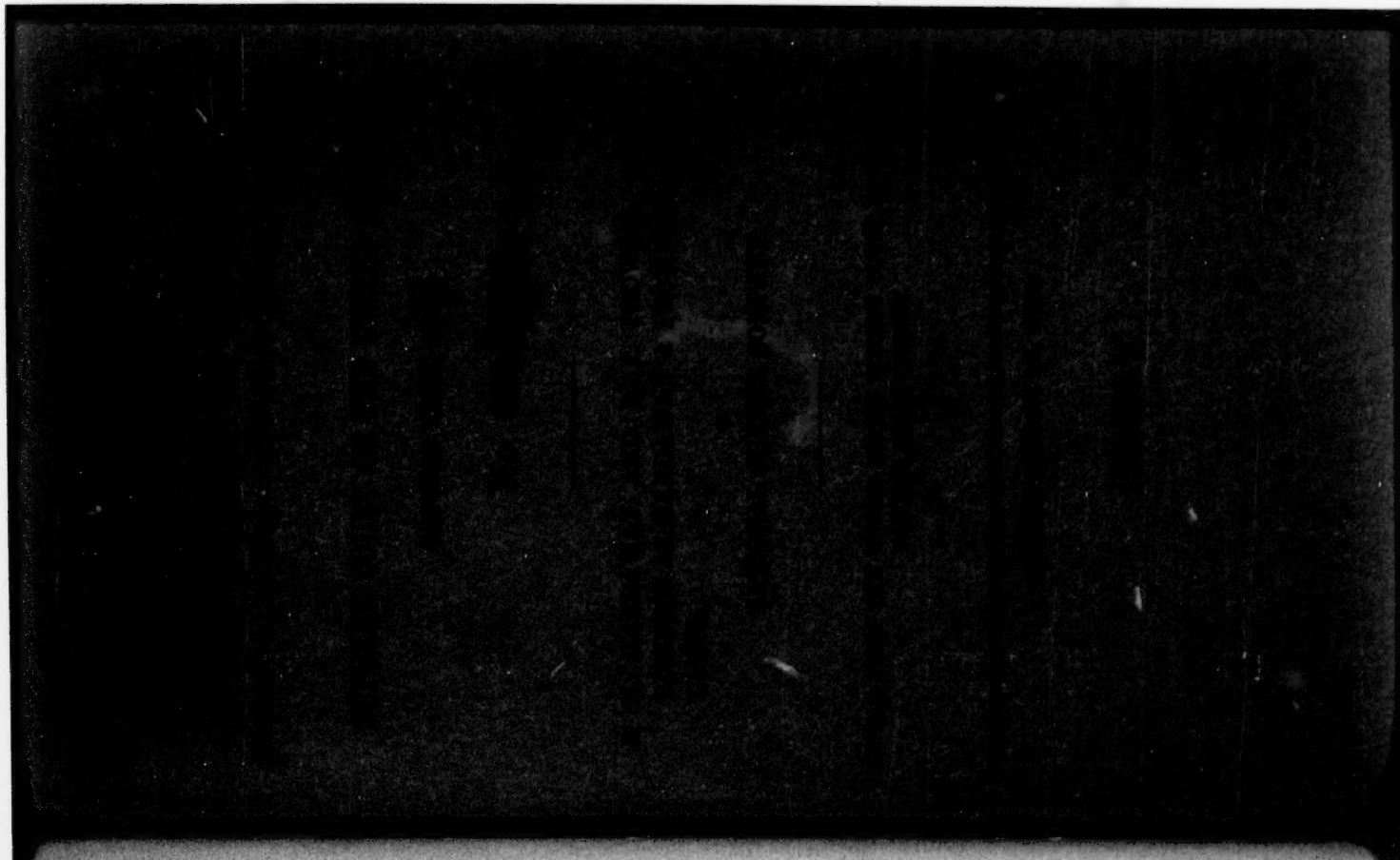


(20,619.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 654.

B. H. HARDAWAY AND R. P. PROWELL, DOING BUSINESS AS HARDAWAY & PROWELL, APPELLANTS,

vs.

NATIONAL SURETY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

	Original.	Print.
Caption ..... (omitted in printing)..	*a*	—
Stipulation as to parts of record to be printed. (" ")..	1	—
Transcript from the circuit court of the United States for the western district of Kentucky	2	1
Bill of complaint.....	2	1
Copy of bond.....	12	9
Affidavit of Alexander Gilmour	13	10
Report of special master..... (part omitted in printing)..	14	12
Decretal order of November 8, 1904.....	14	12
Claim of Hardaway & Prowell..... (omitted in printing)..	36	—
Agreement between Major Rossell and Willard & Cornwell, September 28, 1899.....	104	19
Testimony of Benjamin H. Hardaway	107	21
Richard P. Prowell.. (part omitted in printing)..	118	31
Marcus B. Long	157	59
Exhibit No. 5 (Long)—Report of work from October 1 to November 30, 1904.....	163	63
Testimony of F. L. Crittenden	169	71
Alex. H. Byrd.....	173	75
Exhibit No. 6—Affidavit of Wm. W. Watts	175	77

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1907.

	Original.	Print.
Exceptions to master's report by complainant (part omitted in printing)	176	78
Exceptions to master's report by Hardaway & Prowell (omitted in printing)	188	—
Amended exceptions of complainant to master's report (omitted in printing)	193	—
Exhibit A—Statement showing claims excepted to (omitted in printing)	196	—
Decree	214	86
Opinion	216	88
Petition for appeal	233	103
Assignment of errors (part omitted in printing)	233	103
Appeal bond (omitted in printing)	238	—
Stipulation to send up book (" ")	239	—
Exhibit No. 1 (Prowell)—Statement	239	105
2 (Prowell)—Statement	242	107
AA (Prowell)—Statement	243	108
Clerk's certificate	252	120
Appearance for appellants	253	121
Argument and submission	253	121
Final decree	254	121
Opinion	255	122
Petition for appeal and allowance	267	130
Petition for rehearing	269	131
Order denying rehearing	273	133
Assignment of errors	273	133
Bond on appeal	277	135
Citation (copy)	279	136
Opinion on petition for rehearing	281	137
Clerk's certificate	284	138
Stipulation to omit parts of record in printing	285	139

* * * * * * *

a-2 Proceedings of the Circuit Court of the United States for the Western District of Kentucky, at a Regular Term begun and held at the Federal Court Hall, in the City of Louisville, on Monday, March the 12th, A. D. 1906.

Present and Presiding Honorable Walter Evans sitting as Circuit Judge.

NATIONAL SURETY COMPANY OF NEW YORK, N. Y.
vs.
JAMES E. WILLARD ET AL.

Bill of Complaint.

Be it remembered that heretofore, to-wit; on the 24th day of October, 1904 came the Complainant by W. W. Watts its counsel and filed in the Clerk's office of our said court its bill of complaint in the above entitled cause, which bill of complaint is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western District of Kentucky.

To the Judges of the Circuit Court of the United States, for the Western District of Kentucky:

Your orator, the National Surety Company, a corporation, duly created, organized, existing and doing business under and by virtue of the laws of the State of New York, and a citizen of the State of New York, brings this its bill of complaint against James E. Willard, Charles L. Cornwell and Joseph Coyne, partners composing the firm of Willard & Cornwell, all citizens of the State of Kentucky and residents of Louisville, Kentucky; and thereupon your orator complains and says.

3 I.

That your orator (hereinafter called the Company), is a corporation organized, existing and doing business by virtue of the laws of the State of New York as aforesaid, and thereby authorized to sue and be sued, make contracts and be contracted with and to do a general surety business, and is a citizen of said State with its principal office, place of business and residence in the City of New York, in the State of New York; and that the said defendant, James E. Willard, Charles L. Cornwell and Joseph Coyne, partners under the firm name of Willard and Cornwell (hereinafter called the firm,) are citizens of the State of Kentucky, residing at Louisville, Kentucky, in the Western District thereof.

II.

Your orator would further show that it is, as its name implies, a surety company professionally engaged in the business of becoming surety in various bonds of divers persons and among other considerations it is paid a premium in money as compensation therefor; that on the 28th day of September, 1899, the said firm had become the successful bidders on a contract (hereinafter called the contract), then let by the United States of America (hereinafter called the government) for the construction of Lock and Dam No. 4 Black Warrior River in the State of Alabama; that the construction thereof required a large amount of material and labor and that as was required by the government under an Act of Congress relating to such matters, said firm was required to execute bond on the sum of $50,000 for the faithful performance of the contract and the prompt payment to all persons supplying said firm labor and material in the prosecution of the work under the contract. That on the 5th day of October, 1899, the firm agreed with the Company that it would pay to the company an annual premium of $250 until said work was completed and it discharged from liability on said bond if said Company would become its surety in the said bond. In the application for said bond, which was in writing, the firm made to the Company further representations as to its ability to carry on said work and that it would carry on and complete the same. They further represented agreed and covenanted therein as follows:

"In consideration of the execution of said bond by the National Surety Company (hereinafter called the Company), we hereby covenant with the Company, its successors and assigns:

4 First. That we will pay to the Company the premiums agreed upon, as hereinafter stated, and if premiums are not so stated, or not otherwise agreed on, we will pay premiums at the rate of one per cent. per annum on the amount of the bond or on the amount of the contract price (whichever amount is the greater), for every year the Company's liability thereunder shall remain in force, until the Company shall have been fully discharged and released from any and all liability upon said bond and all matters arising therefrom, and until there shall have been furnished to the Company, at its principal offices in the city of New York, due and satisfactory proof by evidence legally competent, of such discharge and release.

Second. That the undersigned will at all times indemnify and keep indemnified the Company, and hold and save it harmless from and against any and all damages, loss, costs, charges and expenses of whatsoever kind or nature, including counsel and attorney's fees, which the Company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the Company of any and all other bonds executed for us at our instance and request, and that we will pay over, re-imburse and make good to the company, its successors and assigns, all sums and amounts of money which the company or its representatives shall pay, or cause to be paid, or become liable to pay, on account of the execu-

tion of any such instrument, and on account of any damage, costs, charges and expenses of whatsoever kind or nature, including counsel and attorney's fees, which the Company may pay, or become liable to pay by the reason of the execution of any such instrument, or in connection with any litigation, investigation or other matters connected therewith, such payment to be made to the company as soon as it shall have become liable therefor, whether the Company shall have paid out said sum or any part thereof or not. That in any accounting which may be had between us and the company, the company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements whether such liability, necessity or expediency existed or not. All payments specified in the above mentioned contract to be withheld by the obligee until completion of the work shall, as soon as the work is completed, *to* be paid to the company and this covenant shall operate as an assignment thereof and the residue, if any, after reimbursing the company as aforesaid, be paid to the applicant after all liability of the company has ceased to exist under the said bond.

Third. That in case any action at law, suit in equity, or other proceedings be commenced, or notice of such action, suit or proceeding be served upon the undersigned, affecting the liability of the company under such bond, or growing out of any matter connected therewith or on account of which any such instrument was or may have been given, the undersigned shall immediately so notify the Company in writing at its principal offices in the city of New York.

Fourth. That in the event of the failure of the undersigned to comply with, or make due performance of any covenant hereof, the company may at any time thereafter take such steps as it may deem necessary or proper to obtain its release from all liability under any and every such bond, and to secure, and further indemnify itself against loss; and all damage and expense which the company may sustain or incur, or be put to in obtaining such release, or in further securing itself against loss, shall be borne and paid by the undersigned.

Fifth. That no act or omission of the company in modifying amending, limiting or extending any instrument executed by the company, shall in any wise affect our liability hereunder, nor shall we or any of us be released from this obligation by reason thereof; and we agree that the company may alter, change, modify, amend, limit, or extend any instrument and may execute renewals thereof, or other and new obligations in its place or in lieu thereof, and without notice to us, notice being expressly waived, and in any such case, we and each of us, shall be liable to the company as fully and to the same extent on account of any such altered, changed, modified, amended limited or extended instrument, or such renewals thereof, or other or new obligations in its place or in lieu thereof, as fully as if such instrument were described at length herein.

Sixth. That it shall not be necessary for the company to give us, or any of us, notice of any act, fact or information coming to the notice or knowledge of the company concerning or affecting its right or liability under any such instruments by it so executed, or our rights or liabilities hereunder, notice of all, such being hereby expressly waived.

Seventh. That these covenants and also all collateral security if any, at any time deposited with the company concerning the said bond or any other former or subsequent bonds executed for us at our instance, shall, at the option of the company be available in its behalf and for its benefit as well concerning the bond or undertaking hereby applied for, as also concerning all other former or subsequent bonds and undertakings executed for us or for others at our request.

Eighth. That ou execution of any other instrument, whether relative to the bon hereby applied for or to any other former or subsequent bonds e cuted for us or at our request, shall not release us from liability u der the foregoing covenants, unless such other instrument shall e pressly stipulate that we shall be released from such liability.

Ninth. That these covenants shall be binding not only upon us jointly and severally, but as well upon our respective heirs, executors, administrators, successors and assigns."

It was contemplated and agreed and understood as a consideration for the execution of said bond that the said firm and members thereof would give personal supervision of said work; that they were experienced men on contract work; that said work was not to be done loosely; that complainants would be saved harmless from any actual liability by reason of the undertaking; that death only would relieve any of said members from such carrying on of said work in which event the survivors of said firm should carry on the same.

Thereupon the company granted said application and became the surety of the firm in said bond with the said premises, agreements, representations and covenants as the considerations therefor, without other security or indemnity than the covenants therein.

The firm then begun said work the same is now about completed. At one time in the progress thereof, to-wit, about the month of February, 1901, the defendant, Willard & Cornwell abandoned the same to the defendant Coyne. It was agreed in said contract that said work should be carried on without delay, but notwithstanding said work was greatly delayed and several extensions of the time were granted by the government. Subsequent to the abandonment of said work by said Willard & Cornwell, said Coyne abandoned said work and turned over the same to one Richard P. Prowell as the agent of the said Coyne or said firm of Willard & Cornwell. Said government and the company have never in any — consented to the abandonment of said work by said Willard, Cornwell or Coyne, or to transfer of the contract to the said Prowell or anyone.

Your orator shows on information and belief that by reason of

said defendants not giving said work their personal super-
7 vision several expensive washouts on said work and other large unnecessary expenditures and expensive delays occurred which otherwise would have been avoided.

IV.

Repeated complaints coming from said government to the company concerning the delays in said work, the company in July last sent its representative to Alabama and for the first time it was then advised of the situation as herein stated. Finding said Prowell in charge of said work it was learned that said Prowell is interested in and manager or employee of the Allen-Jameson Company, a corporation in business at Tuscaloosa, Alabama, near said work and that said Prowell claims that said company has furnished a large amount of cement for said work and of the value of $5,000.00 which said Prowell says is unpaid; that there is a balance alleged to be $2,200.00 owing the Carolina Portland Cement Company for cement furnished on said work, formal claims for which is filed before the officers of said government; that said Prowell further claims that there is about $1,200.00 owing to him for money advanced by him to pay off laborers on said work; that there is other indebtedness for material and labor on said work aggregating in value the sum of several thousand dollars. Two suits have been brought at Tuscaloosa, in the name of the United States against said firm, seeking the recovery of sums aggregating $1,012.89 for labor or material furnished on said work and judgments have been had thereon and it is alleged by said judgment creditors that your orator will be compelled to satisfy the same with costs and demand from your orator has been made therefor.

V.

Your orator on information and belief alleges that it was provided in said contract that as said work progressed said firm should be paid 90 per cent. of the estimated amount of work done and accepted; that such estimates have been made from time to time; that pursuant to the instructions of said firm since Willard and said Cornwell abandoned said work, same have been directed to be and are now being paid to the said Joseph Coyne through the Merchants or First National Bank at Tuscaloosa; that same is done by manipulation of checks in that said checks for said estimates payable to said firm are sent to said bank; that in turn they are transmitted to Louisville through others where said Coyne's endorsement for said firm is obtained; that said checks are then returned to said bank; that said Prowell thereupon takes said moneys and disposes of same as he may see fit; that said firm exercises no control over the
8 disposition thereof and same is without the consent of the company.

VI.

Your orator shows to the Court that said firm paid the first two years' premium on said bond; that there are now three premiums

due, to-wit, $250.00 as of October 5, 1902; $250.00 as of October 5, 1903; $250.00 as of October 5, 1904, a total of $750.00 in all; that your orator has expended and will have to expend in all about $1500.00 in fees, costs and expense in the protection of itself because of its suretyship in said bond; that there is yet to come from said work on estimates about $2,000.00 and from the reserve about the sum of $8300.00; that the same will be paid to said firm through said Coyne and thence go into the hands of said Prowell; that there is a margin of indebtedness on said work of more than $3000.00 over and above the moneys to be paid by said government; that thereby, even if all said moneys are properly applied to the extinguishment of said debts, your orator must pay other creditors on said work and lose in addition to said $750.00 of premiums and $1500.00 of expense the sum of about $3000.00.

VII.

Your orator will show to the Court that as stated said Willard Cornwell and Coyne have abandoned the work aforesaid; that they and each of them, your orator alleges on information and belief, are insolvent and unable to pay off the debts so contracted on said work and to be paid for labor and material thereon; that said Prowell will, if not otherwise prevented, withdraw the funds coming on said contract and apply the same to the payment of his alleged debt and apply the remainder as he sees fit as he has asserted he will do; that such of it as is not applied to the debts on said work will be paid to the said Coyne or for his use and benefit and not to creditors of said work; that this surety will be left to suffer and will be required to pay under said bond a large sum of money, to-wit, more than $3000.00 for re-imbursement for which it can look only to the said Willard & Cornwell and the individual members thereof.

VIII.

On discovery of the conditions as stated, the company then obtained consent of the War Department of said government which was the department having jurisdiction of said work to hold up for a very limited time the final payment or any other payment on said work pending investigation. Your orator on information and belief alleges that while said department may temporarily suspend
9 the payment of said moneys, it will eventually pay said moneys to said Joseph Coyne as herein stated unless by operation of law under orders of this Court a receiver is appointed for the said firm to receive the said moneys yet to come as stated; that the company has presented to the said government the said application with the covenants therein and has demanded that the reserve fund in the hands of said government be paid to it, said company; that the said government under its usual policy and under the provisions of said contract, refuses to recognize anyone in the transaction save and except the said firm and refuses to pay over said moneys to your orator or anyone save said firm or said Coyne, except to such persons

as may be duly authorized by order of a Court of proper and competent jurisdiction.

IX.

And so it is that your orator shows to the Court that by reason of the covenants in said application for bond, said firm made an assignment to this surety in said bond of all moneys withheld by said government on said contract the same to be paid to the company and in turn disbursed by it, and after re-imbursing the company, any residue thereof to be paid over to said firm; that your orator is without adequate remedy at law; that the circumstances of this case are such that it is without relief save at equity in this Court; that there is involved in this cause a property or fund, in which it has, or probably has a right to or interest in and an assignment of and an equitable lien upon and that the same is in danger of being lost, removed or materially injured and the appointment of a receiver, as herein prayed, to take charge of said property or fund to ascertain and pay off the debts on said work and the said firm's liability to this company, if any of such remains, and an injunction against said defendants, and each of them, enjoining them, their agents, servants, employees or others from in any way collecting, attempting to collect or interfering with the collection of said fund, or in any wise receiving the same save by appearance and pleading in this Court is the only procedure by which this complainant can have security and relief.

X.

Your orator filed herewith as a part hereof a copy of said bond marked "Copy of Bond." The original thereof is in the hands of said government and not within the control of this complainant. It will file herewith as a part hereof the original of said application marked "Application for Contractors' Bond." It will file herewith as a part hereof a copy of said contract between Willard & Cornwell and said government marked "Contract." The originals thereof are in possession of said government and said firm and not under the control of this complainant.

XI.

Your orator would show to the Court that it has no desire to avoid the payment of any just debt created against said work and for which, by reason of the premises, it is legally liable. It does not seek to prevent the misapplication of said funds and it seeks only the proper application thereof. It is simply solvent to pay all said claims. As shown it is bound to make a large loss and the institution of suits by creditors as provided by said Act of Congress, and which are now threatened, will not be of advantage to said creditors, but this company will be harassed by a multiplicity of suits and put to large additional and unnecessary expense in attorney's fees, costs and other expense, all which will be avoided by a disposition of the matter in this Court; that the questions here presented involve a

common or general interest of many persons, the said creditors are numerous and it is impracticable to bring them before the Court within a reasonable time.

XII.

Your orator would further show to the Court that it has repeatedly demanded of said firm that it pay to it the premiums due to it on said bond; that it has repeatedly demanded of said firm protection, satisfaction and indemnity against any loss to it on account of its suretyship on said contract; and that said firm has failed and refused to pay said premiums and give such protection, satisfaction or indemnity, and still fails and refuses the same.

XIII.

And your orator prays that it may have the relief in the premises to which in equity it is entitled, as the same shall appear upon the facts to be just and equitable, and that it may have such relief, the same as if it were here and now made the subject of a specific prayer.

To the end, therefore, that your orator may obtain relief in the premises in this Honorable Court, where alone it can obtain relief, it humbly prays:

1. That it be adjudged and decreed that by reason of the premises, agreements, conditions and covenants of said defendants the money coming from said government is a fund which the complainant as surety is entitled to have applied to the satisfaction of the lawful debts against said work for which said complainant is liable, as also its fees, costs and expenses on account of its suretyship herein; that same is in danger of being lost, removed or materially injured.

11 2. That this Court appoint a receiver who shall proceed to collect the moneys coming to and to come from said government on said work; that said receiver, if necessary, with the aid of this Court ascertain and report all liability against said firm on account and against said work; that if it shall be necessary, all creditors of said firm on account of said work, or said work, be required to assert and prove their claims in this proceeding; and that such receiver shall do and perform all such other things as may now be or hereafter become necessary in the consummation of said matter.

3. That the said defendants, and each of them, their agents, servants and employees, and any and all persons claiming or holding through or under them be restrained and in due order of time perpetually enjoined from in any manner whatsoever collecting, attempting to collect, or in any manner wise interfere with the collection of said moneys or checks coming from said government, except by intervention in this action, and from endorsing or delivering to any person any check or draft issued by the United States of America or any officer thereof, for any part of any money due said defendants, or either of them for said work, until the further order of this Court.

4. That all the creditors of said firm for labor, material, or other

things furnished on said work wherefor your orator is alleged to be liable be required to present their claims to said receiver in this cause and assert them here or be forever barred; and that restraining order or injunction directed to them be entered herein to such effect.

5. That the said defendants be required to make an accounting herein showing the status of such indebtedness, its amount and such other information as should be required under the circumstances; that they be required to answer this bill of complaint and each and every allegation therein contained, but not under oath (answer under oath being hereby expressly waived) the same and as fully as if directly interrogated as to each and every allegation.

6. That your orator recover judgment against said defendants, and each of them, for such amounts as are herein shown to be due and owing to it, and for such other amounts as it shall be ascertained are or will be owing when same is ascertained by such accounting, or otherwise, and for its costs in this behalf expended?

7. And finally to the end that equity may be done and the relief herein prayed and all other relief that it may be righteous in the premises to administer, may be afforded your orator, may it please your Honors to grant and to award against the said Willard
12 & Cornwell, James E. Willard, Charles E. Cornwell and Joseph Coyne, a writ of subpœna of the United States of America, issued out of and under the seal of this Honorable Court, commanding them on a certain day therein to be named, and under certain penalty, to be and appear in this Honorable Court, then and there to answer all and singular the premises, and to stand to, perform and abide by such above or other order and decree as may be made against them.

And your orator, as in duty bound, will ever pray, etc.

NATIONAL SURETY COMPANY,
By WM. E. RILEY,
Gen. Agt. for Kentucky.
[SEAL.] WILLIAM W. WATTS, *Solicitor.*

Copy of Bond.

Know all men by these presents that we Williard & Cornwell, of Louisville, Kentucky, as principal- and National Surety Company, a corporation existing under the laws of the state of New York, as surety, are held and bound unto the United States of America in the penal sum of $50,000 to the payment of which sum well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally firmly by these presents.

The condition of this obligation is such, that, whereas, the above bounden Willard & Cornwell have, on the 28th day of September, 1899, entered into a contract with the United States represented by William T. Rossell, major of engineers for construction of Lock and Dam No. 4, Black Warrior River, Ala.

Now, therefore, if the above bounden Willard & Cornwell, heirs, executors, or administrators, shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said Willard & Cornwell to be observed and performed according to the true intent and meaning of the said contract and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same and shall promptly make full payments to all persons supplying them labor or material in the prosecution of the work provided for in said contract then the above obligation shall be void, otherwise to remain in full force and virtue.

In witness whereof the parties hereto have executed this instrument this fifth day of October, 1899, the name and corporate seal of said surety hereto affixed and these presents duly signed by its resident vice-president pursuant to a resolution of its board
13 of directors passed on the 20th day of May, 1897. A copy of the record of which is on file in the war department.

3. In the presence of G. P. Colgan, I. Buetgenback, as to Willard & Cornwell. By Charles L. Cornwell, one of the firm. National Surety Company.

Attest:

L. A. CRAIG,
M. S. BENNETT,
By TYLER BARNETT, *Resident Vice-President.*

Attest:

[SEAL.] ALEXANDER GILMORE.

In the District Court of the United States for the Western District of Kentucky.

NATIONAL SURETY COMPANY, Complainant,
vs.
WILLARD & CORNWELL, Defendants.

Affidavit of Alexander Gilmour.

The affiant, Alexander Gilmour, says that he was a member of the firm of Slaughter & Gilmour, general agents in Kentucky for the National Surety Company up to the year 1901, at which time said firm resigned its agency and William E. Riley succeeded thereto.

Affiant is familiar with the application of Willard & Cornwell, a firm composed of James E. Willard, Charles L. Cornwell and Joseph Coyne, made to the said National Surety Company for surety in a bond for the faithful performance of the contract with the United States of America by said Willard & Cornwell on the construction of Lock and Dam No. 4, Black Warrior River, Alabama; that he, affiant, personally took application and for and on behalf of the company executed said bond.

Affiant says that prior to such execution of said bond he made investigation of the standing of said Willard & Cornwell and found them to be contractors of experience; that he knew, personally, that the said Willard was a most excellent civil engineer and that said Cornwell had successfully completed several large and important contracts of like character to the work then undertaken; that he was informed by them that they would give their personal supervision to the work and by reason of their representations and promises, said bond was executed.

Affiant says that in that instance as in all other such instances the said applicants made their application on a blank prepared by said National Surety Company and called "Form 99, Application for Contractor's Bond." That the blanks therein were filled in and same was signed by Charles L. Cornwell, a member of said firm.

14 Affiant filed herewith as a part hereof one of said forms marked "Exhibit A, Application for Contractor's Bond," and says that same is the same form which was used in said application and signed Willard & Cornwell, by Charles L. Cornwell.

Affiant says that on the 5th day of October, 1899, the said application so executed was mailed by affiant to the said National Surety Company at its home office in New York City and that he has not seen it since that time.

Affiant says that at the time of the execution of said bond and the application therefor, affiant required of and there was executed by Joseph Coyne what is known as the "Personal Statement" of the said Joseph Coyne as a member of said firm as to his personal financial responsibility; that said Coyne executed such personal statement same being taken in the presence of this affiant and the same is filed herewith as a part hereof marked "Exhibit Personal Statement"; that said personal statement shows that the said Joseph Coyne was a member of the firm of Willard & Cornwell; that he was at that time worth about $42,000.00; that as shown by said statement the said Coyne had been engaged in work similar to that for which said bond was executed for thirty years, and that he as such agent of said company for and on behalf of said company relied upon the statements therein contained and set forth.

Affiant says that but for said application and the representations therein and promises and agreements contained therein and the other representations hereinabove set forth, he would not have executed said bond for said firm.

ALEXANDER GILMOUR.

Subscribed and sworn to before me by Alexander Gilmour this 1st day of November, A. D., 1904. My commission expires on the 1st day of March, A. D., 1908.

M. B. ROBSON,
Notary Public Within and for the County of Jefferson, State of Kentucky.

NATIONAL SURETY COMPANY, Complainant,
vs.
JAMES W. WILLARD ET AL., Defendants.

Report of the Special Master.

To the Honorable Judges of the Court:

In this cause a decretal order, bearing date the 8th day of November, 1904, was entered as follows:

United States Circuit Court for the Western District of Kentucky.

15 NATIONAL SURETY COMPANY, Complainant,
vs.
JAMES E. WILLARD, CHARLES L. CORNWELL and JOSEPH COYNE, Defendants.

By agreement of the complainant and the defendants the temporary restraining order is hereby vacated and set aside.

By agreement it is also ordered that the last estimate made by the United States, amounting to $1,607.68, shall be collected by defendants and paid over to R. P. Prowell and used by him for the completion of the work on Lock and Dam No. 4, Black Warrior River, in the state of Alabama, he, said Prowell to file herein an account showing the application of said sum and to pay into court in this cause any balance that may be left after completing said work.

By agreement of parties it is further ordered that the defendants shall pay into court any further sums that may hereafter be received from the United States on account of said work and shall endorse and deliver to the clerk of this court the checks that may be received therefor from the United States.

By consent of parties it is also ordered that this cause be referred to Henry F. Cassin, special master, to take proof, ascertain and report all unpaid claims now outstanding or that may hereafter be incurred against the defendants for the labor and materials performed and furnished and that may be performed and furnished in the construction of said lock and dam. Said claims may be proven by the affidavits of the parties holding the claims, but any parties in interest shall have the right to contest said claims, and proof may be taken thereon as in other cases in equity.

By agreement of all parties it is further ordered that any sums that may be received from the United States and paid into court by the defendants shall be applied to the satisfaction of the costs of this action and to the satisfaction of all claims that may be proved and allowed in pursuance of the reference aforesaid; and if, after exhausting the funds which shall be paid into court by the defendants, any balance shall remain owing to any of the creditors whose claims may be proved and allowed, the complainant, having agreed as a condition for the entry of this order so to do, shall pay into court

a sufficient amount of money to discharge said claims in full
16 without reduction for costs that may be incurred in the action. No judgment shall be rendered for costs against the defendants herein and the right is reserved to the defendants to contest the complainant's claim herein for premiums, expenses and attorney's fees. If, however, said claims for premiums, expenses and attorney's fees, are contested herein by defendants the costs may be awarded to the successful party to the contest mentioned in this paragraph.

NATIONAL SURETY CO.,
By WM. RILEY, *General Agent.*
W. W. WATTS, *Solicitor.*
JOSEPH COYNE,
By ERNEST MACPHERSON,
Att'y.
JOHN B. BASKIN,
Att'y for R. P. Prowell and Hardaway & Prowell.

I, Henry F. Cassin, Special Master, duly appointed as aforesaid, do respectfully report that I have proceeded to take proof and ascertain the unpaid claims for labor and materials performed and furnished in the construction of Lock and Dam No. 4, in the Black Warrior River, in the State of Alabama, and I now report as follows:

James E. Willard, Charles L. Cornwell and Joseph Coyne, partners doing business under the name of Willard & Cornwell, on the 28th day of September, 1899, became the successful bidders for the construction of Lock and Dam No. 4 in the Black Warrior River, in the State of Alabama, for the United States. Said contractors entered into a bond with the United States under an Act of Congress, approved August 14, 1894, with the complainant, National Surety Company, as surety thereon, whereby it was provided that the said contractors should, among other things, pay all persons supplying them with labor and materials in the construction of said work (Compiled Statutes Vol. 2, page 2523).

The contractors entered upon the performance of said contract on the 5th day of February, 1901, two of the partners, to-wit, Willard and Cornwell entered into a contract with the third partner, Joseph Coyne, by which said Coyne agreed to complete the said work in his own name. There is no testimony that the United States ever recognized this contract between the partners, or that it had any knowledge of the same. All payments made by the United States were in checks payable to Willard & Cornwell.

Joseph Coyne carried on the work under the said agreement between his partners and himself in his own name. On the 2nd day of June, 1903, the said Coyne entered into a written contract with
Hardaway & Prowell, a firm composed of B. H. Hardaway
17–25 and R. P. Prowell, whereby they became sub-contractors agreeing to furnish the means and to complete the said work, which they subsequently did, and the same has been finally

accepted by the United States, and none of the contractors are indebted to the United States in any sum whatever.

Pages 15 to 33 both inclusive of the Special Master's Report relative to the claim of Hardaway & Prowell are as follows:

XVIII.

Claim of Hardaway & Prowell.

This claims as filed is for $57,929.39, with credits amounting to $26,688.06. These credits arose by payments from the United States upon monthly estimates of the work performed.

Under the terms of the contract between Hardaway & Prowell and Joseph Coyne, the proceeds of these estimates must be applied:

1st, to the payment to Hardaway & Prowell of 15 per cent. of the total cost of completing said work:

2nd, to the claim for labor and materials.

I have applied the credits according to this method. After showing the items for materials and labor, I append a summary, giving the debits and credits, with interest calculated, showing the final balance due with interest to March 1, 1906.

The labor and materials furnished for said work by Hardaway — Prowell, and which I report as a proper charge against the complainant, are as follows:

* * * * * * *

26 *Summary*, 1903.

June—Labor and materials		1966.34
Credit June estimate paid	675.79	
Less 15 per cent. on 2090.64	313.59	362.20
		1604.14
27 Balance due July 1st		10.69
Interest to August 1st		3076.62
July—labor and materials		4691.45
Credit July estimate paid	1883.38	
Less 15 per cent. on 3312.65	496.89	1386.49
Balance due August 1st		3304.96
Interest to September 1st		22.03
August—Labor and materials		3821.52
		7148.51
Credit August estimate paid	2752.37	
Less 15 per cent. on 4052.13	607.81	2144.56
Balance due September 1st		5003.95
Interest to October 1st		33.35
September—Labor and materials		4174.08
		9211.38

Credit September estimate paid	2499.03	
Less 15 per cent. on 4295.03	644.25	1854.78
Balance due October 1st		7356.60
Interest to November 1st		49.04
October—Labor and materials		4233.85
		11639.49
Credit October estimate paid	4863.82	
Less 15 per cent. on 4308.74	646.30	4217.52
Balance due November 1st		7421.97
Interest to December 1st		49.47
November—Labor and materials		3507.06
		10978.50
Credit November estimate paid	3091.69	
Less 15 per cent. on 3522.45	528.36	2563.33
Balance due December 1st		8415.17
Interest to January 1st, 1904		56.10
December—Labor and materials		2926.36
		11397.63
Credit December estimate paid	2967.36	
Less 15 per cent. on 2928.16	439.22	2528.14
Balance due January 1st, 1904		8869.49
Interest to February 1, 1904		59.12
28 1904.		
January—Labor and material		2859.67
		11788.28
Credit January estimate paid	1033.07	
Less 15 per cent. on 2897.59	434.63	598.44
Balance due February 1st		11189.84
Interest to March 1st		74.58
February—Labor and materials		2373.36
		13637.78
Credit February estimate paid	1070.36	
Less 15 per cent. on 2373.71	356.05	714.31
Balance due March 1st		12923.47
Interest to April 1st		86.65
March—Labor and materials		1618.90
		14628.52

Credit March estimate paid	453.35	
Less 15 per cent. on 1621.15	243.16	210.19
Balance due April 1st		14418.33
Interest to May 1st		96.12
April—Labor and materials		1559.11
Credit May estimate paid	12440.36	
		16073.56
Credit April estimate paid	269.33	
Less 15 per cent. on 1559.63	233.94	35.39
Balance due May 1st		16038.17
Interest to June 1st		106.92
May—Labor and materials		1962.94
		18108.03
Credit May estimate paid		12440.36
Less 15 per cent on 2021.57	303.22	937.14
Balance due June 1st		17170.89
Interest to July 1st		114.47
June—Labor and materials		2064.51
		19349.87
Credit June estimate paid	941.43	
Less 15 per cent. on 2111.77	316.75	624.68
Balance due July 1st		18725.19
29–101 Interest to August 1st		124.83
July—Labor and materials		1594.09
		20444.11
Interest to September 1st		136.29
August—Labor and materials		1462.07
		22042.47
Less 15 per cent. on 3192.55	478.87	
Less credit	48.35	430.52
Balance due September 1st		22472.99
Interest to October 1st		149.81
September—Labor and materials		2251.90
		24874.70
Less credit	1290.60	
Less 15 per cent. on 2392.12	358.81	931.79
Balance due October 1st		23942.91
Interest to November 1st		159.61
October—Labor and materials		1963.90
		26066.42

Less credit	1607.68	
Less 15 per cent. on 1992.46	298.86	1308.82
Balance due November 1st		$24757.60
Interest to March 1st, 1906		2640.81
November—Labor and materials		3897.12
Int. from Dec. 1, 1904 to March 1, 1906		389.71
December—Labor and materials		114.30
Int. from Jan. 1, 1905 to March 1, 1906		10.66
January—Labor and materials		871.61
Int. from Feb. 1, 1905 to March 1, 1906		75.53
Due March 1st, 1906		$32757.34

* * * * * * *

102 *Summary.*

Material used	$10,312.18
Labor	40,061.11
	50,373.39
15 per cent. as per contract for services	7,556.00
	57,929.39
By cash Willard & Cornwell to date	26,688.06
Balance due	31,241.33

Total Amount of Pay Rolls.

May, 1903	$589.20
June	1,667.38
July	2,745.06
August	3,483.07
September	3,535.80
October	3,076.40
November	3,193.65
December	2,646.95
January, 1904	2,659.70
February	2,222.20
March	1,597.65
April	1,495.40
May	1,604.65
June	1,963.65
July	1,426.40
August	1,367.10
September	1,923.75
October	1,682.25
November	415.50
December	114.30
Time paid from city office	650.35
	$40,061.11

103 Credits.

1903.	
June estimate—675.79 am't	$675.79
July estimate—2090.63 less 207.25 am't rend. by J. C. Coyne	1883.38
August estimate—2852.37 less 100.00 am't rend. by Coyne.	2752.37
Sept. estimate—2617.68 less 118.65 am't rend. by Coyne..	2499.03
Oct. estimate—5063 less 200.00 am't rend. by Coyne.....	4863.82
Nov. estimate—3091.69	3091.69
Dec. estimate—2967.36	2967.36
1904.	
Jan. estimate—1183.07 less 150.00 am't rend. by J. C. Coyne	1044.07
Feb., 1904—1070.36	1070.36
March—503.35 less 50.00 am't rend. by J. C. Coyne.....	453.35
April—269.33	269.33
May—1240.36	1240.36
June—941.43	941.43
July & August—48.35	48.35
Sept.—1290.69	1290.69
October—1607.68	1607.68
	$26,688.06

THE STATE OF ALABAMA, *Tuscaloosa County:*

Before me the undersigned Fleetwood Rice, a Notary Public in and for said state and county, who being first duly sworn, deposes and says that he is a member of the partnership of Hardaway & Prowell, which said partnership was employed by the contractors, Willard & Cornwell, to complete Lock No. 4 in the Warrior River above Tuscaloosa, Alabama; that the foregoing account is just, true and correct, and that the items thereof are correct and are just and proper charges against said Willard & Cornwell; that the items of credit shown in said account are all the credits, offsets and discounts to which said account is entitled; and that the balance, after deducting said credits and offsets is justly due and unpaid; affiant further says that all the labor and materials furnished by the firm of Hardaway & Prowell, as shown in said account were furnished for, and were actually used in and about the construction of said Lock No. 4.

R. P. PROWELL.

Sworn to and subscribed before me this 20th day of February, 1905.

[SEAL.] FLEETWOOD RICE,
Notary Public.

104 This agreement entered into this twenty-eighth day of September, eighteen hundred and ninety-nine, between Major Wm. T. Rossell, Corps of Engineers, United States Army, of the first part, and James E. Willard, Charles L. Cornwell and Joseph Coyne, partners composing the firm of Willard & Cornwell of Louisville, in the county of Jefferson, State of Kentucky, of the second part, witnesseth, that, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Major Wm T. Rossell, Corps of Engineers, U. S. Army, for and in behalf of the United States of America, and the said Willard & Cornwell, of Louisville, Ky., do covenant and agree to and with each other, as follows:

The party of the second part agrees to furnish the materials and perform the work required in the construction of Lock and Dam No. 4, Black Warrior River, Ala., at the following prices for material in place, excavation, and grubbing and clearing.

Quoins, per cubic yard, twenty-two dollars ($22.00); coping per cubic yard, eighteen dollars and eighty cents ($18.80); pointed face masonry, per cubic yard, thirteen dollars and fifty cents ($13.50); rock face masonry, per cubic yard, twelve dollars and twenty cents ($12.20); rubble masonry, per cubic yard, seven dollars and forty cents ($7.40); dry rubble masonry, per cubic yard, five dollars and fifty cents ($5.50); excavation, per cubic yard, thirty cents ($0.30); rock excavation, per cubic yard, one dollar ($1.00); embankment, per cubic yard, thirty cents ($0.30); stone filling, per cubic yard, one dollar and twenty-five cents ($1.25); paving, per cubic yard, one dollar and fifty cents ($1.50); riprap, hand-placed, per cubic yard, one dollar and twenty-five cents ($1.25); puddling, per cubic yard, fifty cents ($0.50) bolt holes in masonry, per linear foot, fifteen cents ($0.15); mitre sills, per 1000 ft. b. m., twenty-five dollars ($25.00); framed timber, per 1000 ft. b. m., twenty-three dollars ($23.00); sheathing, per 1000 ft. b. m., twenty-five dollars ($25.00); grubbing and clearing, complete, one thousand dollars ($1,000.00).

The party of the first part agrees to pay to the party of the second part for furnishing materials and performing work required in the construction of Lock and Dam No. 4, Black Warrior River, Ala., at the rates above specified.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

105 The said Willard & Cornwell shall commence work as required by paragraph 34 of the specifications hereto attached, and shall complete the work as required by paragraph 34 of the specifications hereto attached.

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment

of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in Section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other forces or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in specifications as to character and quantity, whether of labor or materials, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those
106 named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or material shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

The party of the second part shall be responsible for and pay all

liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments shall be made to the said Willard & Cornwell in accordance with paragraph 31 of specifications hereto attached.

Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said Willard & Cornwell are reserved to the United States.

No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto
107 placed their hands the date first hereinbefore written.

Witnesses:
F. A. HAPPER,
WM. A. WALLER.

As to WM. T. ROSSELL, [SEAL.]
As to *Major of Engineers, U. S. A.*
As to WILLARD & CORNWELL, [SEAL.]
As to By CHAS. L. CORNWELL,
One of the Firm

(Executed in Quintuplicate.)

Approved: Nov. 2, 1899.
A. MACKENZIE,
Acting Chief of Engineers.

The deposition of H. B. Hardaway above referred to in the stipulation is as follows:

THE UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division:

STATE OF ALABAMA, *County of Tuscaloosa, ss:*

The examination of witnesses *de bene esse*, beginning on the 30th day of October, 1905, on behalf of the complainant, by consent, before me, S. Lamar Field, a notary public, at my office in the city

of Tuscaloosa, in said district of Alabama, in the state aforesaid, in a certain suit now pending and undetermined in the Circuit Court of the United States for the Western District of Kentucky at Louisville, in the district aforesaid, wherein the National Surety Company is plaintiff, and Willard & Cornwell and others are defendants.

BENJAMIN H. HARDAWAY, a witness produced on behalf of the complainant, being first duly sworn, deposes and says as follows:

Examined by HENRY FITTS, attorney for complainant:

Q. Mr. Hardaway, are you the Hardaway mentioned as a member of a co-partnership of Hardaway & Prowell, which propounds a claim against the National Surety Company, in this cause?

A. I am.

Q. When did you first become connected with the building of the lock number four (4)?

A. On the 2d day of June, 1903.

Q. In what way did you become connected with this work?

A. I became connected with it by virtue of an agreement made with the parties building the lock, as shown in the written agreement.

Q. Will you examine this paper and state whether that is a copy of the contract?

108 A. To the best of my recollection it is.

Q. Will you please attach this paper to your deposition as "exhibit A"?

A. I will, with the understanding that if I can find the original paper, I will substitute it for the copy.

Q. Mr. Hardaway, state the circumstances and negotiations leading up to your entering into the contract, a copy of which you have just attached to your deposition?

A. I came to Tuscaloosa on some other business, was invited by Mr. Prowell to go up and look at his work, and while there, as a result of a conversation which I had, this contract was entered into.

Q. Mr. Hardaway, what other contracts did you make relative to this work at or about the time you became connected with it?

A. I do not know whether I understand the meaning of your question exactly, but I have no recollection of making any other contract, I do not remember any paper or agreement which might be called a contract.

Q. Did you ever enter into any agreement with Allen & Jemison Company by which you were to be insured or indemnified against loss in this work?

A. No; I did not; but I was sorry that I didn't.

Q. Did you make any contract, or did you have any understanding or agreement with Joseph Coyne, or any other person by which your losses under the contract attached would be made good, or were to be shared by others?

A. I made no agreement other than the above mentioned written one.

Q. What was your participation in the prosecution of this work from the time you entered into that contract until the present time?

A. It is largely set forth in the contract. I practically did the things called for. I organized the forces, sent foremen, planned the execution of the work, and kept in touch with the work constantly, and directed the manner in which it was to be conducted and its completion.

Q. In other words, you took actual charge and control of this work?

A. Mr. Prowell is the resident partner of the firm who took charge of the work. My work was planning and advising.

Q. Then you were only in Tuscaloosa or upon the scene of the work at widely separated intervals?

A. Yes, that is true, putting the words "at comparatively widely separated intervals." I really had supervision over three or
109 four pieces of work, and gave this pro rata share of my time.

Q. You and Mr. R. P. Prowell, then, undertook the entire management of this work, to the exclusion of Joseph Coyne, did you not?

A. No, we did not. We would have been very glad of any advice or assistance from Mr. Coyne.

(Complainant's move to exclude the statement that the witness "would have been glad," and what follows upon the ground that it is uncalled for and irrelevant.)

Q. Did Mr. Coyne participate in the management of this work after you and Mr. Prowell took charge of it?

A. I do not think that he did to any marked extent.

Q. You and Mr. Prowell, then, as a partnership of Hardaway & Prowell, complied with the terms of your contract, as above set out, and supplied all the means necessary in the prosecution of the work?

A. As far as I know, we did.

Q. I inquire particularly as to the financing of the work and the money with which it was done?

A. I believe that we did that as far as it has been financed.

Q. To what extent has it been financed?

A. I am not sufficiently familiar with the matter to say.

Q. Is the firm of Hardaway & Prowell out of debt?

A. I do not think it is.

Q. Could you not tell us something that you know?

A. It is not out of debt.

Q. Have you any information of your own as to what amount was paid by Hardaway & Prowell for labor employed in the prosecution of this work?

A. Only so far as our books show, and I do not remember that?

Q. How was that labor paid, in checks or money?

A. Mr. Prowell being the resident partner of the firm, I do not know.

Q. Do you know approximately how much your pay rolls amounted to each month during the progress of this work?

A. I do not.

Q. How often was your labor paid?

A. I do not know how often the labor was paid.

Q. As a matter of fact, the labor was paid was it not?

A. It was.

Q. As a matter of fact, Mr. Hardaway, each man who worked for Hardaway & Prowell on that job got his money, has he not?

110 A. So far as I know, they have.

Q. So far as you know, Hardaway & Prowell owe no money to any laborer who performed work on that job?

A. So far as I know we owe them no money.

Q. Is it not a fact that Hardaway & Prowell in the progress of this work, kept up their pay rolls, and that the labor was paid in each instance substantially at the time the firm undertook to pay it?

A. It is.

Q. And does your knowledge of the details of this work enable you to state exactly or approximately for what purpose the various items of material included in your claims were used?

A. I think I could by examining the claim.

Q. A considerable sum is claimed for coal at the price of $1.25 per ton. Please state for what purpose that coal was used, and what became of it?

A. The coal was used for running the boilers, pumping, hoisting stone and the prosecution of the work generally in order to facilitate and cheapen the conduct of the work.

Q. Who was that coal bought from?

A. I do not know.

Q. Was it paid for?

A. I do not know. I know that Hardaway & Prowell owe considerable debts for material, and I think for supplies; but to whom I do not know of my own personal knowledge.

Q. Do you know how much Hardaway & Prowell owe?

A. I do not.

Q. We find here a number of items claimed for stationery, ledgers, journals, time checks, statement blanks, letter heads, coin envelopes, were those supplies used for the prosecution of your business, in connection with this work?

A. I would suppose that it was.

Q. Who was it bought from?

A. I do not know.

Q. Was it paid for?

A. I could not say.

Q. There are a good many items here for tools of various sorts, shovels, adz handles, hand saws, ship augers, hammers, hoes, wheel barrows, screws, picks and the like, were those tools bought and did they become the property of Hardaway & Prowell?

A. I suppose they were bought. I saw from time to time such tools as you describe used in the work.

111 Q. They were the property of Hardaway & Prowell, were they not?

A. I would suppose so.

Q. Did they ever become the property of the United States?

A. Not to my knowledge.

Q. Numerous items for machine steel run through the account, for what was that steel used?

A. That was a supply which we used for drills in the stone quarry.

Q. There are items here for circular grates, what are they used for?

A. They are used in the upright boiler on the work?

Q. That, then, is a part of the boiler?

A. Yes, a repair part of the boiler.

Q. There are numerous items for machinery, steam hose and coupling and for rope of various sorts, unions, nuts and the like, will you state whether or not these supplies were used for keeping up your machinery and apparatus in the work, or if they became a part of the works turned over to the United States?

A. They were in no way turned over to the United States. They were supplies used in the creation of the work.

Q. They never became the property of the United States?

A. No; they did not.

Q. As much of them as are not worn out, are now the property of Hardaway & Prowell, are they not?

A. Yes.

Q. What do you know of an item of $370.00 for ice?

A. I know that we provided ice for the laborers. As such, I believe it to be a part of their compensation.

Q. I find items for Yale pad locks, strap hinges, roofing, etc., can you explain what those items were used for?

A. I would suppose that they went into the construction of the shanties for the laborers.

Q. These houses did not become the property of the United States, did they?

A. I do not suppose that they did, but I do not know. I think they are built on the land of the United States.

Q. There is a recurring item on your claim for pulling barges in the river and repairing barges, will you be kind enough to explain those items?

A. I am not sufficiently familiar with them to explain them.

Q. You spoke of Hardaway & Prowell being indebted, and
112 you have said that you did not know the amount of that indebtedness, please state in what form that indebtedness now is?

A. I am not sufficiently familiar with the business to answer that question. I will state that Mr. Prowell has been the resident partner of the firm, and I have not seen him for two or three months and can not say in what form this indebtedness is at present. I do not know what it is for. When I was here previously, a great deal of it was for open accounts, some of it might have gotten into the form of promissory notes since then, so far as I know.

Q. Is it not a fact that such material as was purchased by Hardaway & Prowell and put into this work, and has not been as yet paid for, was purchased upon the credit of Hardaway & Prowell?

A. As far as I know, we certainly made no purchases in any name, other than our own.

Q. How much money, if any, did you put up in the putting forward of this work?

A. Individually, I think I have put up about $8,000.00.

Q. In money?

A. Yes.

Q. At one or more times?

A. At various times.

Q. When Hardaway & Prowell took charge of the work what was on the ground, or what did Mr. Coyne then have in the way of equipment, tools and apparatus.

A. That would be a long question for me to answer in detail. I can say that he had a very fair equipment in the way of barges, tools and apparatus.

Q. In what condition?

A. Some in bad condition and some in good condition. A great deal of the timber we found to be rotten when we attempted to use it.

Q. What has become of that apparatus and those tools there when you took charge of the work?

A. Mr. Prowell would have to answer that question.

Q. Are they not in the possession of Hardaway & Prowell?

A. I do not know, it is my understanding that they revert to their original owners, and with reference to the ownership of certain tools, and other supplies which you have questioned about previously, I would say that the ownership is vested in the parties who would own them under the contract referred to in the first part of the deposition.

Q. During the progress of this work, you drew numer-
113 ous monthly estimates from the government did you not?

A. Through the contractors.

Q. How were the checks signed?

A. I do not know.

Q. Was such money drawn pursuant to the contract?

A. It was.

Q. Then any money advanced by Hardaway & Prowell during the progress of this work was repaid to them so far as the funds drawn for that purpose would do it?

A. I do not know.

Q. The fact is you do not know how the books of Hardaway & Prowell were kept do you?

A. To a large extent that is true.

Q. The contract provides that the compensation of Hardaway & Prowell as provided for in this contract, is the first item to be deducted from moneys drawn from the Government, was the money so applied?

A. Now, I do not know how the books were kept, but I will state that the needs of the work were so urgent that Hardaway & Prowell did not at any time take away from this work any payment for services.

Q. There are numerous items for lumber included in your account, from whom was that lumber purchased?

A. I do not know.

Q. Do you know persons from whom any portions of it were purchased?

A. No, all of these matters were in Mr. Prowell's hands, the resident partner of the work.

Q. Do you know from whom the cement which went into this work after you took charge was purchased?

A. It is my recollection that most, if not all of it was purchased from Allen & Jemison.

Q. Where and for what purpose were the dynamite and blasting powder included in this claim used?

A. In the foundation of the dam, in excavating for the lock and in the quarry from which we got stone.

Q. The quarry was at some other point?

A. Yes, probably a quarter of a mile from the location of the dam. I will state here that a 6 foot channel had to be excavated in the bed of the river for the purpose of building the bed of the dam.

Q. Then a part of that dynamite and powder were used in hollowing out that channel?

A. Yes.

Q. Of the lumber included in the account, what proportion was actually incorporated in the work and turned over to the Government?

114

A. That will be shown by the estimates, but I do not recollect well enough to give you the information.

Q. The remainder of that lumber was used for what purpose?

A. In the construction of coffer dams.

Q. The lumber was, then, after it had served its temporary purpose, taken out of the river was it not?

A. No, it was valueless.

Q. What became of it?

A. It is probably there yet.

Q. Am I to understand that all of this lumber included in this bill either became incorporated in the completion or was used, as you state, in building coffer dams?

A. Practically all of it. Parts of it were probably used in repairing the houses.

Q. It is not a fact that some portions of the timber was purchased for the purpose and used for your derrick equipment?

A. I remember that during the prosecution of the work that some sticks of timber were purchased to replace parts of derricks which had rotted before we began work. My estimate of the cost of such derrick timber would be about $300.00 or $250.00. There was no scaffolding used in the construction of the dam.

Q. Mr. Hardaway, the work upon this dam was, I believe, undertaken by you and Mr. Prowell in June, 1903, and continued through

the year 1904, how many times were you personally present on this work during that period of time?

A. I can not answer exactly, but I would suppose some 6 or 8 times.

Q. And how long did you stay upon the occasion of each visit?

A. I spent from one to two days in Tuscaloosa each time.

Q. Did you ever notify the National Surety Company of the execution of the contract, a copy of which you have attached to your deposition?

A. I did not.

Q. Did you ever notify them that you and Mr. Prowell had this work in charge?

A. I did not.

Q. Was the National Surety Company ever notified?

A. I do not know.

Q. At the time you entered into the contract, a copy of
115 which you have attached to your deposition, you were then apprised of the financial condition of Mr. Coyne?

A. To a certain extent.

Q. To what extent?

A. To the extent represented in the contract.

Q. No further?

A. No.

Q. Were you not aware at that time that either Willard & Cornwell or Joseph Coyne was heavily indebted to Allen & Jemison Company for tools and supplies previously furnished in the prosecution of this work, and that Allen & Jemison were then preparing to bring an action by which they would subject all of this paraphernalia on this work to the payment of the claim?

A. My recollection is that I was told that money was due to Allen & Jemison by these contractors. I know of no action or intention on the part of Allen & Jemison Company.

Q. Were you not informed and did you not then know that Allen & Jemison claimed a lien on this equipment and those tools by reason of a contract which had been theretofore made between Coyne and Willard & Cornwell?

A. It is my recollection that I was told that Allen & Jemison Company had a mortgage on this equipment or a part of it.

Q. Did you make any investigation as to what was the extent or character or nature of that lien of which you were informed?

A. No.

Q. Did you take any steps whatever to more fully inform yourself in regard to Coyne's relationship to that contract or to that property of which you spoke?

A. None whatever.

Q. Did you at the time of entering into this contract with Joseph Coy*be* know or did you have any reason whatever, of any kind to believe that a contract relative to this job had been previously made between Willard & Cornwell, of the one part and Joseph Coyne of the other?

A. My understanding was that in executing a contract with me,

Joseph Coyne had the right to act for his partners with the same force as if they, had acted with him.

(Complainants move to exclude the foregoing answer upon the ground that the same is not responsive to the question and is immaterial.)

Q. Please answer whether or not you then knew or had ever heard of a contract between Willard & Cornwell and Joseph Coyne?

116 A. To be frank, I did not. I will say in so far as may be recited in the contract.

Q. Then you testify that although you were apprised that there was a mortgage to Allen & Jemison upon the equipment you were taking over with which to do this work, you made no investigation whatever to ascertain the terms of that mortgage or its nature?

A. I certainly did.

Q. Mr. Hardaway, your contract refers to an arrangement between Joseph Coyne and Willard & Cornwell, did you see the contract which evidenced that arrangement, or did you take any steps to acquaint yourself with the contents and nature of that arrangement before entering into your contract, as attached to your deposition?

A. If I saw the contrat, I saw it incidentally. I took no steps to acquaint myself with the contract.

Q. Did you see it?

A. It is my recollection that I did not.

Q. Did you not learn early in the progress of your connection with this work that Allen & Jemison had immediately after the execution of your contract filed suit against Willard & Cornwell and Coyne to enforce a lien against the tools and equipment, left by Coyne on the work, claiming said lien under the arrangement made between Willard & Cornwell and Joseph Coyne referred to in your contract?

A. No; I did not.

Q. When did you first learn the nature of or become apprised of the contents of the arrangement between Willard & Cornwell and Joseph Coyne?

A. I have never learned the arrangement, nor do I know the contents of it.

Examined by Mr. J. B. BASKIN, attorney for Hardaway & Prowell:

Q. The account of Hardaway & Prowell, filed before the special master in this cause, shows quite a number of credits, which I show to you, now I will ask you where the funds came from for which those credits were given?

A. They came, as I understand it from checks sent by the government.

Q. Do you know to whom those checks were made payable?

A. I do not.

Q. Do you know from whom Hardaway & Prowell received those checks, whether from the government direct or whether from Willard & Cornwell or Coyne?

A. I do not.

117 Q. As a matter of fact, then, you have no personal knowledge of any of the payments or credits which Hardaway & Prowell received?

A. No; I have not.

Q. Is it true or untrue that you have no personal knowledge as to how any of the credits were applied, that is to what particular items they were applied?

A. It is true. I have never seen one of the checks.

Q. Mr. Fitts has asked you about a great many debit items on the account of Hardaway & Prowell such as nuts, bolts, roofing and numerous other items, do you know of your own personal knowledge, not from hearsay, how any of these items were actually used in this work?

A. I know from personal knowledge.

Q. Will you state?

A. I know that a large amount of the nuts and bolts were required for use in the construction of the coffer dams, and also in attaching the timber to the permanent part of the dam.

Q. The contract between Hardaway & Prowell, of the first part and Joseph Coyne of the second part, on the first page speaks of "an arrangement between him (Coyne) and his co-partners (Willard & Cornwell)," I will ask you if before you signed this contract dated the 2d of June, 1906, you were not advised by Mr. P-owell and by Mr. Verner of the full nature of the arrangement between Willard & Cornwell and Coyne, and is it not true that Mr. Verner and Mr. Prowell had either a memorandum with a copy thereof of the agreement which was made by Willard & Cornwell on the one part and Coyne on the other, and did you not learn the matters about which I have asked by conversation with Mr. Verner and Mr. Prowell in the office of Mr. Manly Foster, before the execution of this contract in June, 1903?

A. My recollection is that a reference was made to some agreement by which Coyne prosecuted this work for the firm. It is not my recollection that its full contents were ever placed before me, or that I have ever read them, nor do I know to-day what such contract was, if any existed.

Q. You were, however, advised that a contract had been made between Coyne and his partners, under which he was to complete this work, and to make such arrangements as were necessary for so completing it, was that true or not?

A. It is largely true, say to the extent of a contract.

Q. You have said that the arrangement was made with
118 the consent of the government, are you mistaken or not about the government part of it—what is your best recollection?

A. It is not my recollection that I have ever discussed any of the matters with the engineer or representatives of the government, and I only refer to Coyne's authority to conduct the work.

Q. Did any one ever tell you that the government consented for Coyne to carry on the work which had been left to the firm?

A. It is not my recollection that they did.

B. H. HARDAWAY.

The deposition of Richard P. Prowell referred to in the stipulation is as follows:

RICHARD P. PROWELL, a witness produced on behalf of the complainant, being first duly sworn, deposes and says as follows:

Examined by HENRY FITTS, attorney for complainant:

Q. Mr. Prowell, what is your place of residence and your age?
A. Tuscaloosa. Thirty-five.
Q. What is your business?
A. I am a member of the firm of Hardaway & Prowell and also one or two other companies and corporations.
Q. Are you a stockholder and director in the Allen & Jemison Company?
A. I am.
Q. Are you not the general salesman of that company?
A. I am one of them.
Q. How long have you been connected with Allen & Jemison Company in the capacity of a salesman?
A. Since 1888.
Q. When was the firm of Hardaway & Prowell formed?
A. June, 1903.
Q. Is the formation of that co-partnership evidenced otherwise than by a certain contract of June 2, 1903, between Hardaway & Prowell and Joseph Coyne?
A. Yes, there is an agreement between Mr. Hardaway and myself.
Q. Is that agreement in writing?
A. Yes, I think it is, but I have no copy. I am not sure whether there is one. I have looked for it, but I am under the impression that there was one.
Q. If you have not a copy of that contract, or if that contract was not in writing, then state as nearly as you can the terms of the contract of partnership between yourself and Mr. Benjamin
119 H. Hardaway?
A. We were to divide the profits or the losses.
Q. Did you have any recollection of the terms or stipulations of the written contract, providing for this division of profits or losses?
A. The only thing that I know is that my understanding with Mr. Hardaway was that we would divide the profits or losses.
Q. In what proportion were those profits or losses to be divided?
A. Equally.
Q. When did your acquaintance with one Joseph Coyne begin?
A. In 1899.
Q. Which was about the time that the construction of lock 4 began was it not?
A. About the time the contract was awarded.
Q. From the time of your earliest acquaintance with Mr. Coyne up to June, 1903, Allen & Jemison Company sold many tools and a great deal of hardware for the construction of this lock, did they not?
A. Yes.

Q. This trading was done through Mr. Joseph Coyne, was it not?
A. Principally.
Q. Mr. Coyne was secured as a customer of Allen & Jemison's firm, through your efforts?
A. Willard, Cornwell and Coyne all three were.
Q. The business transacted by Mr. Coyne, whether you contend this business was done for him in his own behalf or for a firm of which he was a member, with the Allen & Jemison Company, was transacted in the larger part through you as a member of that concern, was it not?
A. I didn't say that.
Q. During the several years in which Mr. Coyne purchased goods from Allen & Jemison, did you not see him frequently, and did you not in person sell him a great deal of hardware?
A. Yes, material used in the construction of the work.
Q. Such material as you sold him is included within the itemized statement of Allen & Jemison's claim on file with the special master?
A. Yes.
Q. Was it not through your efforts and labor that a certain mortgage was executed by Joseph Coyne to the firm of Allen & Jemison to secure the payment of outstanding indebtedness, which
120 mortgage was afterward foreclosed, resulting in a credit of some $300.00 upon the accounts of Allen & Jemison Company?
A. I don't think it was.
Q. Did you know of the execution of that mortgage at or about the time it was made?
A. I did.
Q. In dealing with Joseph Coyne as the representative of the Allen & Jemison Company, were you aware that he had executed a mortgage upon the outfit which was being used upon this work to J. E. Willard and one Cornwell?
A. No, sir.
Q. In order to be understood in speaking of a mortgage I refer to a contract made by Joseph Coyne with J. E. Willard and C. L. Cornwell which was filed in the office of the probate judge of this county on Feb. 8th, 1901, and which was made an exhibit to a bill filed by Allen & Jemison against Willard & Cornwell on June 4th, 1903?
A. I knew that there was an agreement between them.
Q. Did you know the nature of that agreement?
A. Yes, sir.
Q. Had you read that agreement?
A. Yes, sir.
Q. Then in the course of your dealings with Joseph Coyne you became acquainted with the contents of this paper at or about the time it became a matter of public record in this county?
A. Yes, sir.
Q. Now, in order to identify a certain reference contained in the contract between Joseph Coyne and Hardaway & Prowell on June 2,

1903, I wish to know if the contract of which I have just inquired is the contract which is meant by the reference contained in your contract with Mr. Coyne, where these words are employed, "Whereas, shortly after the beginning of work upon said lock the said Joseph Coyne by an arrangement between him and his co-partners undertook to complete and finish said lock according to the specifications in the contract with the United States"?

A. I understood that the arrangement between Coyne and his partners referred to in the contract of June 2, 1903, meant the arrangement contained in the contract between Coyne and his partners, which contract is dated Feb. 5th, 1901, and is the contract about which you, Mr. Fitts, are inquiring.

Q. The firm of Hardaway & Prowell was formed contemporaneously with the execution of the contract of June 2, 1903, with Joseph Coyne, was it not?

121 A. They were both made about the same time.

Q. The firm of Hardaway & Prowell was formed for the purpose of entering into and carrying out this contract with Joseph Coyne, was it not?

A. Yes.

Q. This contract with Joseph Coyne is the only contract work upon which Hardaway & Prowell have ever been engaged, is it not?

A. It is.

Q. In those negotiations which led up to the making of the contract between Hardaway & Prowell and Joseph Coyne, who first made the proposition which was afterwards embodied in this contract, you or Mr. Coyne?

A. Coyne made the proposition.

Q. Did not this proposition grow out of the fact that Coyne was heavily indebted to Allen & Jemison Company and the further fact that the Allen & Jemison Company, through you or some one else was pressing upon Coyne for the payment of that debt or pressing upon him to provide some security for that debt?

A. That and for the reason that he didn't have the money to carry on the work.

Q. Coyne then proposed to you that if you could secure the necessary means to complete this contract, that the per centage in the keeping of the government and the profits thereafter to be earned would be enough, not only to pay Allen & Jemison's debt, but to yield a profit to such persons as you might interest in financing the completion of the work, isn't that true?

A. He proposed it according to that contract between us.

Q. Can you answer the question?

A. That is the way it was proposed according to that contract. That was the proposition made me.

Q. Was the proposition which Joseph Coyne first made to you exactly the same proposition without charge or modification as is now embodied in the contract of June 2d, 1903.

A. I didn't say it was word for word, it is practically. It was made to others before it was made to me.

Q. Then am I to understand that the proposition first made by

Joseph Coyne was along the same general lines as are evidenced by the contract of June 2, 1903?

A. That is what I said.

Q. Then state the proposition as first made by Joseph Coyne as nearly as you possibly can?

A. Read the contract.

122 Q. Is that the only answer you can give to the next preceding question?

A. I can just say that you can embody in that the contract.

Q. To what other persons was this proposition made?

A. I didn't see the proposition made, but I have been told by Coyne that he made the proposition to two parties in Louisville, the names I haven't in my possession.

Q. Did he make that proposition to any person in Tuscaloosa other than yourself?

A. I can't say for sure.

Q. Was Mr. Hardaway invited into this contract by you?

A. Yes.

Q. The invitation was extended to him by letter, was it not?

A. Personally, when he was in Tuscaloosa on other business.

Q. Immediately before Mr. Coyne made you the proposition which led up to the contract of June 2, 1903, had you not insisted that he must make immediate payment or properly secure Allen & Jemison for the debt which he owed them?

A. Not in total.

Q. Had you not insisted to Joseph Coyne that his indebtedness to Allen & Jemison at that time was too large and that he must either reduce the amount of that indebtedness or make some provision to secure the payment of that indebtedness, either in whole or in part?

A. I had insisted that he must make payment on his account.

Q. Is it not true that this contract then grew out of his answers to your demands for payment?

A. Principally.

Q. At the time you entered into the contract with Joseph Coyne you knew that he was heavily indebted to Allen & Jemison and that he had no means with which to carry forward this work, did you not?

A. I don't know what he had.

Q. Didn't you know at that time that he was heavily indebted to various merchants in the city of Tuscaloosa?

A. Yes.

Q. Had not Coyne stated to you that he was unable to carry forward this work?

A. Yes.

Q. Then knowing this condition of affairs, did you not
123 inform the National Surety Company of the fact that you had taken charge of this work?

A. Not at that time. I did later.

Q. When?

A. When Mr. Riley came down here.

Q. Can you fix the time when he came down when you told him?
A. I don't know what date. I don't remember just exactly what time, but my best recollection is that Mr. Riley was here in 1904.
Q. Isn't it a fact, Mr. Prowell, that Mr. Riley came down here and said that he wanted to know what was going on up there?
A. Yes.
Q. That he visited you in search of information upon the subject?
A. Yes.
Q. The account of Allen & Jemison Company as filed with the special master shows numerous credits paid at various times, were any of these credits paid by an endorsement or handing over of the government checks issued on monthly estimates to Allen & Jemison?
A. No, sir; there was not.
Q. When Hardaway & Prowell began this work certain tools were found upon the work which was very shortly thereafter sold and bought in by Allen & Jemison Company, did Hardaway & Prowell use these tools in their prosecution of the work?
A. Part of them. All that we needed.
Q. Did Hardaway & Prowell pay Allen & Jemison for tools?
A. They did not.
Q. Are those tools charged against Hardaway & Prowell on the subsisting account between Hardaway & Prowell and Allen & Jemison Company?
A. They are not.
Q. Where are those tools now?
A. Part at the lock, part at the store, and part sold.
Q. From whom did Hardaway & Prowell purchase the coal used in the prosecution of this work?
A. Warrior Coal Company and Blair Coal Company.
Q. Has that coal been paid for?
A. Yes, sir.
Q. From whom was the lumber used by Hardaway & Prowell in prosecuting this work purchased?
A. From various parties.
124 Q. Can you name them?
A. Some of them. W. D. Barren, C. B. Olmstead, Tuscaloosa Lumber & Mfg. Co., R. P. Prowell and others.
Q. Has this lumber been paid for?
A. It has.
Q. Mr. Prowell, all of the labor hired by Hardaway & Prowell in the prosecution of this work has been paid has it?
A. Yes, sir.
Q. And this labor was paid just at the time that you undertook in your contract with the laborers to pay it, was it not?
A. Why in a few days afterwards. Mostly one or two days after pay day. Approximately at the time contracted.
Q. The claim of Hardaway & Prowell as filed in this cause includes items for stationery, account books and the like, have those things been paid for?
A. They have.

Q. Has the ice included in your account been paid?

A. We have paid for it.

Q. There are items included in the account for hauling and switching charges, and repairing barge, and rent of barge, have the people who did this work for Hardaway & Prowell been paid by Hardaway & Prowell?

A. They have. I'll say that there is sixteen dollars and some cents that we have not paid, there is a discrepancy between us and the claimant.

Q. Mr. Prowell when did you individually begin to take charge of this work?

A. At the date of the contract with Coyne.

Q. Mr. Prowell, I see here that you begin in your account rendered the Special Master, for pay rolls in May, 1903, whereas this contract was not signed until June 2, 1903, what is the explanation of that?

A. There was a back pay roll that Coyne owed for work done in May.

Q. And you paid that?

A. Yes, sir.

Q. Before you began to look after this work under the contract of June 2, 1903, were you not frequently upon this work watching its progress and in a measure advising as to its prosecution?

A. I was there a few times, but not advising.

Q. About how many times were you there?

A. Five or six times from the first of January 1903 to the 1st of June, 1903.

Q. Did you not during that time keep yourself informed as to what this work was costing and what it was bringing in?

125

A. I can't say that I did.

Q. At whose instance and for what purpose were you making these several trips to the scene of this work?

A. Trying to sell goods and trying to collect money.

Q. Hardaway & Prowell still own the tools and outfit purchased for the building of this lock do they not?

A. Most of them were worn out on the job, what we bought.

Q. Such as were not worn out you now own?

A. Yes, sir.

Q. State the various kinds of material which entered into the permanent structure provided for by the original contract between Willard & Cornwell and the United States after Hardaway & Prowell took charge?

A. Stone, sand, cement, lumber, poles, washers, iron, nuts, timbers, dirt, cinders, poles, sand bags, welding compound, nails, spikes, blasting powder, dynamite and fuse, electric wire, lead wire, oakum, willow brush, battery wire, blasting caps, and many other items that I can furnish by checking over the list more carefully.

Q. Mr. Prowell, from whom did you get your stone?

A. We got this stone from the Warrior Coal Company.

Q. Have you paid for it?

A. Yes, sir.

Q. Have you paid for the sand, gravel, dirt and cinders?

A. The sand and gravel was sold delivered as material, and has been paid for, dirt and cinders also.

Q. Have the willow brush, sand bags, poles and battery wires been paid for by Hardaway & Prowell?

A. The poles and brush have. Part of the bags and battery wires have not.

Q. From whom were these bags and wires purchased?

A. Allen & Jemison and Western Elevator.

Q. Has the Western Elevator been paid?

A. It has.

Q. Were not the cement, oakum, explosives, welding compound, bolts, nuts and the iron purchased from Allen & Jemison Co.?

A. Most of it.

Q. Is the statement of account of Allen & Jemison Company with Hardaway & Prowell, as given in the deposition of Mr. M. P. Jemison correct?

A. It is as far as I know.

Q. Has any portion of the hardware or explosives been
125 purchased from any other person that the Allen & Jemison Company? If so, then please state whether or not the persons supplying the same have been paid by Hardaway & Prowell?

A. They have.

Q. Is Hardaway & Prowell indebted to any person other than the Allen & Jemison Company for any material entering into the construction of this Government work?

A. They are.

Q. To whom?

A. Sacks from Maxwell Brothers, about $25.00, sand and gravel from Ezekiel Prince $5.40; University of Alabama, sand and gravel, $22.02; W. D. Barron, lumber, $35.18; C. B. Olmstead, lumber, $3.54; Tuscaloosa Lumber & Manufacturing Co. $7.71. This is the amount due other people than Allen & Jemison Company for material as well as I can tell without going over the books more carefully.

Q. Did you keep the books of the firm of Hardaway & Prowell?

A. Mr. Fincher did part of the time, Mr. W. H. Farmer did part of the time, and I did part of the time.

Q. You now have the books of the firm in your keeping?

A. I have.

Q. Will you please show me the cash account between Hardaway & Prowell and Joseph Coyne?

A. I will have to make that out for you. It is not complete there. I have none here, it was all done through the bank. I have a memorandum of it in the bank books.

Q. Have you nothing at all upon your books to show how much money you received from Joseph Coyne during the period you were engaged in this work?

A. Yes, sir it is in the bank book.

Q. No where else?

A. I don't remember.

Q. Have you the bank book?
A. I haven't.
Q. Where is it?
A. The banks have a record of it.
Q. Then the only record which you have of the money received by Hardaway & Prowell from Joseph Coyne is to be found upon books kept by the bank, and which you have not in your possession?
A. The complete record is kept by the bank.
Q. Please show me any partial record you have of that cash account?
127 A. I can bring you that when I come from dinner this afternoon.
Q. Haven't you the books of Hardaway & Prowell right on the desk before you?
A. Not all of them.
Q. From what source is the list of creditors included in your statements as rendered to the Special Master compiled?
A. Most of them are checks made out to Willard & Cornwell, endorsed by Joseph Coyne as one of the members of the firm, and were first sent to Tuscaloosa directed to Willard & Cornwell care of Merchants Bank, then turned over to us to be forwarded to Mr. Coyne for his signature, he made his endorsement, as one of the members of the firm of Willard & Cornwell, endorsing it as follows: "Willard & Cornwell, by Joseph Coyne, as one of the members of the firm."
Q. Did you have those checks in your possession at the time this line of credits was compiled?
A. Those that were returned to me I did.
Q. Have you those checks now in your possession?
A. No, sir.
Q. Where are they?
A. The Government has them, I guess, I put them in the bank, deposited them.
Q. When you came to make out this account, did you make it out from those checks?
A. No.
Q. What did you make it out from?
A. I made it out from my deposit.
Q. Did you deposit in each instance the full amount of the check?
A. In full of the amount received from Coyne.
Q. The full amount of the check?
A. The amount received from Coyne.
Q. In some instances the amount received from Coyne was a less amount than the face of the check?
A. It was.
Q. What became of those differences?
A. I don't know what he did with it. I know what he said he did with some of it. He said some of it went to pay insurance to the Surety Company.

Q. Did you not cash the checks yourself?
A. No, sir.
Q. Did Hardaway & Prowell cash them?
A. Some of them they did.
128 Q. When Coyne got money out of a check didn't you give it to him?
A. Not all the time no, sir.
Q. When you didn't give it to him how did he get the money?
A. Took it himself.
Q. Cash the check himself and take some out and deliver you the balance?
A. Yes, sir.
Q. Do your books contain original entries of how much money Joseph Coyne took out of the amount of checks before delivering them to you?
A. Yes, sir.
Q. Please show me those original entries?
A. No answer to this question.
Q. Does the list of credits as appended to your claim on file represent the face of the several checks received?
A. Yes, that is the face when they came to Tuscaloosa. That was the estimate from the Government less their charges.
Q. What is this book?
A. That is our ledger.
Q. Is there any account in this book between Hardaway & Prowell and R. P. Prowell?
A. Yes, sir.
Q. Will you show it to me, please?
A. Witness here shows book.
Q. I find upon the debit side of this ledger under date of August 27, an item for $330.00, for what does that stand?
A. That stands for $330 that I advanced personally to Hardaway & Prowell until a check came in that was due then. That stands for a demand note borrowed from R. P. Prowell.
Q. That is the only item on the debit side of that account?
A. Yes, sir.
Q. I find upon the credit side on July 31 an item for $2982.20, what does that stand for?
A. Money that I advanced on this work to Hardaway & Prowell.
Q. I find upon the credit side of this ledger an entry of July 31 for $2982.20, one of Oct. 11 for $642.75, and one of Dec. 10 for $540.06, making a total credit of $4165.61, what does this stand for?
A. Money advances Hardaway & Prowell. The $330.00
129 charged to R. P. Prowell was money refunded him by the firm which was a part of the money gotten from him before that day.
Q. Have you an account in the book with B. H. Hardaway?
A. I have.
Q. Please show it to me.

A. (Here shows account.)

Q. I find upon the credit side of this ledger an item of July 31, 1904, $5114.38; of Sept. 1, $150.00, and of Oct. 11, $2400.00, amounting in all to $7574.78, and upon the debit side one item of Dec. 10, for $102.90 state the reasons and explanations of these entries?

A. The $7574.78 was money advanced Hardaway & Prowell by B. H. Hardaway, the $102.90 was money refunded B. H. Hardaway & Prowell for money advanced before that date.

Q. Do the several items on the credit side represent cash actually put in the business?

A. Actual cash put into the business.

Q. Are these shown by the Journal entries?

A. Yes, sir.

Q. Out of the money received by you of checks from the Government what amount was applied to the payment of the fifteen per cent. stipulated for and given first preference in this contract of June 2, 1903 between Hardaway & Prowell and Joseph Coyne?

A. None was applied that way at all.

Q. Do I understand that none of the cash with which Hardaway & Prowell are credited on the ledger came by way of these commissions?

A. None whatever.

Q. Have you any record consecutive and complete of the money expended by Hardaway & Prowell in the progress of this work?

A. I can make that up from the books.

Q. From what books?

A. From Hardaway & Prowell's books.

Q. Is not a complete statement of all money disbursed by you in the progress of this work shown by your check stub books?

A. Yes it is shown all that was paid out from this office. There was money paid from the office at Tidewater that is not shown by the check book.

Q. But the money which was disbursed at Tidewater was
130 first drawn from the bank from a check shown on the check book?

A. Not all of it.

Q. Have you any record of money disbursed at Tidewater that is not on your check books?

A. I can give you that record.

Q. Is it included in any of these books on the table here?

A. Only by taking it from one account and another.

Q. State exactly how you will arrive at those disbursements made at Tidewater?

A. The difference between the pay roll and the amount of money that was checked out of the bank.

Q. The difference between the monthly pay roll and the amount which your stub book shows was drawn out of the bank for labor for that particular month, that it?

A. Sum total.

Q. Did you draw any money out of the bank for anything but labor?

A. Yes.

Q. The difference between the pay roll and the amount your stub book shows was drawn out for pay roll.

A. The money disbursed for labor at Tidewater never went into the bank.

Q. Then it is not a fact, Mr. Prowell, that you deposited all of the money coming from Hardaway & Prowell in the bank and then checked out everything that you disbursed?

A. Not every dollar.

Q. Then your pass book and your check book do not supply a complete record of your cash?

A. No.

Q. And you have no other record thereof?

A. No.

Q. Then you have no way of stating with exactness the amount of money that Hardaway & Prowell disbursed in the progress of this work?

A. I have.

Q. What is it?

A. Just as I have stated. The difference between the pay roll as made out, and amount of cash checked out of the bank for pay roll purposes.

Q. What record have you of cash disbursed that did not come out of the bank?

A. I will have to do that by subtracting one account from the other.

131 Q. Then a complete record of your cash received and disbursed is shown by your check book stub, your pass book and by your pay rolls?

A. That is right.

Q. And the only money disbursed by Hardaway & Prowell which was not deposited in the bank is to be ascertained by deducting from the total pay roll in each month the sum total of money withdrawn from the bank in that month for pay roll purposes?

A. This is not a fact.

Q. If this is not the fact, then state wherein it falls short of being the correct method of arriving at the total disbursements of Hardaway & Prowell?

A. In cases where we advanced money and goods from the commissary.

Q. Were not these goods purchased by money disbursed through checks?

A. Some of them were.

Q. Then you purchased some merchandise without issuing checks therefor?

A. Yes, sir.

Q. Of the money expended for merchandise for which a check was not drawn you have no record?

A. No, sir.

Q. Then the money advanced to labor was advanced through checks drawn on your book, was it not?

A. Not all of it.

Q. Then of the money so expended you have no record?

A. Not in detail, but have in total.

Q. Let us see the account in total of these advances?

A. I can make that out for you from the difference between the different accounts on the book.

Q. State exactly how you will arrive at this money which you advanced without drawing a check for it?

A. By the difference between the goods sold at the commissary and the pay roll.

Q. You have forgotten the question, haven't you?

A. No, sir; I wish to add to the preceding question that to show the amount of the money expended for pay roll can be arrived at by adding together the proceeds of the commissary and the money drawn from bank for pay roll.

Q. Mr. Prowell did I now correctly understand that the checks drawn by Hardaway & Prowell upon the Merchants' National Bank except for comparatively small amounts advanced directly to labor, show all money disbursed by Hardaway & Prowell in the
132 progress of this work?

A. No, sir; there was $1,000.00 that was paid in cash through the First National Bank, and I am not positive that this is on the checks.

Q. I asked you if the checks evidenced everything?

A. Yes, sir; as I remember.

Q. In addition to having some or all of the checks you have, since our adjournment at dinner time, found the cash account upon your ledger?

A. Yes, it is on the ledger.

Q. Which enables you to know how much money you have disbursed?

A. Yes.

Q. Then please state the sum total of all the money spent by your firm in the progress of this work?

A. This is according to this ledger, this book here.

Q. Did you make that memorandum of which that is a copy?

A. Yes, sir; material and labor, $57,929.39.

Q. That amount includes, so far as you are able to give it, every cent expended by your firm in this work, is that right?

A. Up to the date that this is made out. Up to the time the account filed with the special master was made out.

Q. Now, you have credited against this $57,929.39, which includes fifteen per cent. on $50,373.39, does it not?

A. Yes, sir.

Q. Then the amount actually disbursed by you up to the time of the filing of the claim with the special master was $50,373.39? Was it not?

A. Yes, sir.

Q. The only credits which you have given in your statement as filed with the special master consists of the amount realized by your

firm from checks issued by the United States government, is that right?

A. Yes, a part of them were checks and a part was money handed me by Joseph Coyne.

Q. This money handed you by Coyne was realized by him from checks handed to him by the government?

A. Issued to Willard & Cornwell.

Q. Is it not a fact that Hardaway & Prowell ran a commissary at the scene of this work?

A. It is.

Q. Is it not a fact that goods were sold out of that commissary to the labor there employed?

A. It was.

133–136 Q. Is it not a fact that considerable portions of the money disbursed by Hardaway & Prowell was for merchandise put into and sold out of that commissary?

A. It was, some of it?

Q. How much of it?

A. The merchandise account is not so separated so that I could give you this without going through same and check out the items for the reason cash was run through same.

—. Before closing this deposition, can you supply us with a detailed statement of all money expended by Hardaway & Prowell for merchandise with reference to the original entries upon your books so that they may be identified by an accountant who attempts to verify your statements?

A. I can.

Q. Will you do so?

A. I do, and mark the same exhibit B to my deposition.

Q. How many men did you employ in the work of the commissary?

A. We had one man who kept time, and stayed in the commissary and looked after one gang of men acting as foreman.

Q. You had no other employé in the commissary whatever?

A. Never had but one.

Q. Did you employ a bookkeeper?

A. That held position as bookkeeper and storeman, and was superintendent in the absence of the regular superintendent.

Q. Was the commissary a profitable or an unprofitable portion of the work of Hardaway & Prowell?

A. It shows a little gain.

Q. How much?

A. I attach hereto a statement showing the proceeds of the commissary, and mark the same exhibit C.

* * * * * * *

137 Q. In what manner was your labor paid, by checks or in commissary, or in money?

A. They were given, that is the negro laborers, and in fact all day labor, each night a time check which is a piece of pasteboard.

Q. These checks were good for merchandise in the store or for cash when turned in on pay day?

—. ——

Q. These were redeemed in goods or in money, or in checks on the bank?

A. Yes sir.

Q. Have you separate accounts of the money paid the laborers by checks and that paid to them in money?

A. I have not.

Q. Have you any way of determining how much money you paid out to labor as distinguished from the payments made to labor through the sale of goods in the commissary?

A. I can't do that now but will make it out and file it as Exhibit D to this deposition.

Q. From what source did you make up the statement of labor claim as filed with the Special Master?

A. From the pay roll.

Q. From the pay roll?

—. ——.

Q. This then is a copy of the monthly pay rolls?

A. Yes.

Q. And there is nothing in that pay roll to show how much of their earnings the laborers took up in commissary supplies?

A. Not in this monthly pay roll book.

138 Q. Have you a record now ready made which shows how much of their earnings the respective laborers took up in commissary supplies?

A. I couldn't say until I examined the records in detail with the bookkeeper, which *record* I will do and render you a list of the same to the best of my knowledge.

Q. About what was the amount of the monthly business done by this commissary?

A. That I will also have to make you a statement of.

Q. Have you nothing there from which you can give it to me now?

A. Here is a book you can get it from.

Q. Will you take the merchandise account of Hardaway & Prowell as contained on pages 205 to 214 of your ledger and give me the total amount expended by Hardaway & Prowell in the purchase of merchandise?

A. I will and mark it Exhibit E.

Q. How much cement exactly was put into this work by Hardaway & Prowell?

A. It shows on the list rendered you, which is approximately 1190 barrels.

Q. Did you buy all that cement from Allen & Jamison?

A. To the best of my recollection we bought some from other parties.

Q. What price did you pay Allen & Jamison for that cement?

A. Different prices. Some at $2.94 and some at $2.50.

Q. How much profit was realized by Allen & Jamison upon that cement?

Mr. BASKIN objected to this question upon the ground that it is impertinent, inquiring into the private affairs of Allen & Jamison Company.

A. To the best of my recollection it was three or four cents per barrel.

Q. Didn't you at that time know the value and how to buy cement as well as Allen & Jamison Company?

A. Not being a jobber, but a consumer, would not place the firm of Hardaway & Prowell in a position to buy this cement as close as Allen & Jamison.

Q. Mr. Prowell, is it not true as a matter of fact that your connection with this work was merely as an agent or employé of Allen & Jamison Company?

A. Not in any way whatever.

Q. Is it not a fact that the losses or the profits which might have arisen out of that contract was the property of the Allen & Jamison Company?

139 A. It is not. It all comes out of Dick Prowell.

Q. Was there not an understanding between you and the firm of Allen & Jamison before you entered upon the contract with Coyne that in event the venture proved a failure you were not to be held responsible to that company for the material supplied by it in the progress of the work?

A. Not in the least.

* * * * * * *

Q. Mr. Prowell, you have an individual account of some $1889.60 in this case?

A. Yes, sir.

Q. I see that you have the first item building one barge $30.

A. Yes, sir.

Q. Did you build that barge or did you simply pay for having it built?

A. I had it built.

Q. State how that came about?

A. I had some timbers on the river belonging to — saw mill man. I had also working for me a carpenter that made me a price on building this barge, after Coyne had asked me to see what I could get it built for.

Q. That barge never became the property of the government, it was used in the work?

140 A. In the work.

Q. I find several items for loading sand and gravel, and building sand chute, what is the explanation of those items?

A. They got out of sand a number of times at the lock and were very busy the last few days of the month trying to make the estimate as large as possible, Mr. Coyne 'phoned me personally to please deliver him at the earliest possible moment as many barges of sand and gravel as I could load or have loaded, so that the work would not be delayed. This I did with by own labor and others. I built the sand chute and helped to load some of the gravel into the sand

chute, and towed one of the barges through the lock at night with the assistance of other men to keep from delaying the work.

Q. Has the labor that you employed in those matters been paid by you?

A. Yes, sir.

Q. Did you buy that sand or pay a royalty on it?

A. Yes, sir.

Q. That has been paid, has it?

A. Yes, sir, some of it I did. Some of it was gotten out of the river bed, where there was no charge.

Q. An item for building coffer dam on Dec. 1902, for $200.00, will you explain your connection with that coffer dam?

A. A man by the name of Holcrombe was constructing the dam for Joseph Coyne. For the failure of Joseph Coyne to advance him money any further for the work he had done, which Croyne claimed was as much of the work he had done come to. I settled the dispute between the two by trading with Holcrombe to finish the work for $200.00, which work he did finish, and which money I did pay Holcrombe.

Q. This item for coal 30.2 tons, how did you happen to be a creditor of Coyne's for coal?

A. Mr. Coyne had no credit with the Warrier Coal Company, Coyne at the time was not on the job, his foreman asked me to get for them this coal, which I did.

Q. And paid for it?

A. Myself.

Q. I notice these items: Cash $17.80; cash Morgan Bros. $15.00; cash Morgan Bros. $7.90; paid J. R. Stallworth by check $138.53; explain these.

A. This was money advanced for Coyne while he was out of town for the advancement of the work.

141 Q. What was the money paid Morgan Bros. and J. R. Stallworth for?

A. Meat.

Q. I see that you have a charge for money on March and April, 1903, pay roll, is that money that you had paid out to labor?

A. I paid it to his labor.

Q. Were these items or any of them charged upon the books of Allen & Jamison Company?

A. None of them, Allen & Jamison knew nothing about them.

Q. It is then a fact that for some six or eight months before Coyne made the contract with Hardaway and Prowell that he was very hard pushed for money to meet his current accounts?

A. Some months he was, when he had small estimates.

Q. And it is further a fact that you were assisting him in meeting his obligations as necessity arose?

A. No further than what you see there.

Cross-examination by Mr. JOHN B. BASKIN, attorney for claimant:

Q. In your personal claim filed in this case I find the following items: Building barge, loading sand and gravel; building sand chute

and loading sand, dam, and gravel, catching barge down the river, sand and gravel. I'll ask you whether those charges were all part of the cost of delivering that sand and gravel or not?

A. They were.

Q. There is one item here for $200.00 for building coffer dam; I will ask you whether that coffer dam was built by Holcrombe by employment with Coyne, or whether it was built by Holcrombe as your employé upon the work?

Complainant objects to this question because it calls for the conclusion of the witness.

A. Holcrombe built the dam for me, that is, this part of it.

Q. Is it not true that Holcrombe refused to work for Coyne in constructing that part of the coffer dam, and by an arrangement you undertook to procure the building of that part of the coffer dam and engaged Holcrombe to build it for you?

A. I did.

Q. There are two items for coal on this personal account of yours, is it not true that you bought and paid for and supplied that coal for the prosecution of this work?

A. I did.

142 Q. What was that coal used for?

A. Engines settling stone on the rock wall, and engines in the stone quarry.

Q. About what proportion was used in each of those sets of engines?

A. I am not able to say.

Q. Can you approximate it? The bill is $44.10, about how much of that was used at the quarry and about how much of that was used in settling rocks?

A. If I had to estimate it, I would say half as near as I can tell.

Q. As to the coal used in the quarry was or not that coal part of the cost of getting out and finishing the stone ready for its delivery and use in the dam?

A. It was.

Q. On this personal account, there is two items for labor, May pay roll and on March and April pay rolls, I will ask you if it isn't true that the laborers were furnished with envelopes evidencing the amount they were entitled to be paid and if you didn't take a transfer from the laborer and pay them that much?

Complainant objects to this question because it is not the best evidence of the transfer.

A. I did.

Q. What became of those envelopes after you had taken the transfer of them?

A. I have some of them. I have all of them, I would say at my house.

Q. I will ask you to file all those envelopes as part of your deposition.

A. I will do so and mark them Exhibit —.

Q. Mr. Prowell, you were the man in active charge of carrying

on this work after the written contract made with Coyne on June 2nd, 1903, were you not?

A. Yes, sir; I was active member of the firm.

Q. Mr. Hardaway didn't live here and you did live here?

A. Yes, sir.

Q. And had immediate charge and direction of the carrying out of that work did you not?

A. Yes, sir.

Q. Did you yourself assist in any manual labor in discharge of your contract to superintend that work, if so, state what you did in that line.

A. I have done various things there. I looked after generally the entire work.

Q. State what you did in the way of assisting in manual labor?

143 A. I laid off work for the carpenters, cut and fit pipes, repaired boiler, riveted valves in pumps, riveted tubes in inspirators, barged, that is poled one barge, and poled sand and gravel up the river, loaded lumber, and a number of other things that I don't recollect.

Q. Did you load any sand?

A. I did.

Q. Did you load any gravel?

A. I did.

Q. Roll any wheelbarrows containing the material?

A. Yes, sir.

Q. All this was done with your own hands?

A. All I did.

Q. And was in the prosecution of this work?

A. Yes, sir.

Q. Is it a fact that Joseph Coyne was a member of the firm of Willard & Cornwell who had the active direction of this work for this firm?

A. That is my knowledge of it.

Q. You don't know, do you?

A. Yes, sir; he was.

Q. Mr. Fitts asked you yesterday what knowledge the Guaranty Company had of Hardaway & Prowell undertaking of this testimony assisting Mr. Fitts, his counsel, isn't a fact that Mr. Riley, the General Agent of the National Surety Company, who has been present during the taking of this testimony assisting Mr. Fitts, his counsel, did not come down and talk to you about it, and if so, what he said about Hardaway & Prowell having taken up the work.

Complainant objects to any statement of what Mr. Riley said, upon the ground that same is irrelevant and immaterial, and upon the further ground that no circumstance or facts are shown which would make the statements, if any, inquired about as made by Mr. Riley, binding upon the complainant.

A. Mr. Riley asked how long it would take to finish the work, and if we needed any assistance to complete the same.

Q. What kind of assistance was referred to, financial or otherwise?

A. Financial.

Q. Did Mr. Riley express any pleasure or displeasure at your firm having taken up this work?

Complainant renews the objection as last made, and applies it to this question.

144 A. He left me under the impression that he wished to see the work finished as early as possible, which was carrying out a request that the Government had made.

Complainant moves to exclude the witness' statement of his impression.

Q. What did Mr. Riley say that gave the impression on your mind as to whether he was satisfied or dissatisfied at your having taken the work. What did Riley say in substance?

A. Mr. Riley said that the Government had written them that the work was not being pushed like it should be and that he was down investigating to see why same was not being pushed. I explained to him in regard to the washouts of the dam at different times which was to an extent the cause of the delay.

Q. What did he then say about your firm continuing the work, if anything?

Complainant objects to this question upon the ground that it is now shown that any statement made under the circumstances inquired about would be binding upon this complainant, and upon the ground that the same is immaterial and irrelevant?

A. He encouraged me to complete the job at the earliest possible moment.

Q. To refresh your memory I will ask you if Mr. Riley didn't then tell you that he was going to Mobile and that he would be back here shortly thereafter and that he hoped you would do all you could to hasten that work?

Complainant objects to this question upon the same grounds as the next preceding question.

A. He did.

Q. Did Mr. Riley also tell you in substance that he was soon coming back to Tuscaloosa for the purpose of taking up all claims upon said work and settling them?

Complainant objects to this question upon the same grounds as the next preceding question.

A. Mr. Riley said that he would come back to Tuscaloosa later, asked me to please get a list of the claims, and be in a position to give any information I could in regard to same.

Q. Was Mr. Riley the agent acting for the complainant, National Surety Company, during all these times in the business connected with this work?

A. He represented himself to me as such.

Q. Isn't it a fact that Mr. Riley since the taking of the testimony began in Tuscaloosa in the office of Mr. Henry Fitts, was
145 present during the taking of the evidence assisting Mr. Fitts in the examination of witnesses on behalf of the complainant?

A. Yes.

Q. Mr. Prowell, do you know anything about the complainant holding any bank stocks or other collaterals obtained for any of the firm of Willard, Cornwell & Coyne as indemnity for any loss which the complainant may have to sustain on account of the bond this complainant executed?

A. Only what Mr. Riley told me when he was here, and what Coyne told me when in Tuscaloosa.

Q. What did Mr. Riley tell you?

Complainant objects to this question upon the ground that it calls for hearsay testimony, and upon the further ground that it is not shown that Mr. Riley was such agent of the company or was then acting in such capacity in complainant's business as to render admissions or declarations made by him legal testimony in this cause.

Q. Did that conversation with Mr. Riley occur in connection with this work and while he was representing himself as the agent of the company?

A. Yes, sir.

Q. Now state what Mr. Riley said?

The same objection is made by complainant to this question as when first asked, with its grounds.

A. Mr. Riley stated that the papers pertaining to this bond held by the National Surety Company were in New York when he took charge of the office and that same was sent him at Louisville. He further stated that the Surety Company held some bank stock of Cornwell's as collateral, and that there was some other security put up by Coyne.

Q. Did he state what this bank stock and these securities were put up for? If so, what did he say?

Complainant objects to this question upon the same grounds set out to the original inquiry as to what, if any thing, Mr. Riley said to the witness.

A. That these were the only security that the Surety Company had for going on the bond of Willard & Cornwell that he saw visible for them to get anything out of.

Q. Did Mr. Riley seek you to talk about matters of which I have inquired, or did you seek him, and if he sought you, where did he find you?

A. I went to the work at Tidewater with Mr. Riley the day he was here.

Q. That doesn't answer the question; did you seek Mr.
146 Riley or did Mr. Riley seek you for the purpose of discussing these matters?

A. Mr. Riley looked me up.

Q. I will ask you if Coyne, after he became embarrassed, didn't make a proposition for the creditors to take up and finish this work before your firm made its contract with him?

A. He did.

Q. Was that proposition the same substantially as the one which you finally entered into for your firm?

A. Practically so, as well as I remember it.

Q. Your contract provides for paying your firm fifteen per cent. for finishing up this work. Was that fifteen per cent. usual and reasonable or not for the services?

A. We considered it so.

Q. Was it in fact reasonable?

A. It was.

Q. Mr. Prowell, I'll ask you if you can take the statement of Allen & Jamison Company filed in this case and from it make a statement showing what items on that account went into the lock and dam, what into the commissary and what into the office; in other words, what was material that went into this work and what was not, and file a separate statement showing this fact, if you will do so at the next meeting for the continuance of your testimony?

A. I will mark it Exhibit —.

Q. I'll ask you then, when you prepare the statements called for by Mr. Pitts, to file a statement for Hardaway & Prowell, showing what they furnished as materials, what as labor, what they furnished that went into these locks and dams, and what went for other purposes, classifying them under the proper headings?

A. I will and mark them Exhibit —.

Q. I'll ask you also when you file the statements above called for, if you will file a statement showing how the different laborers were paid, how much in cash, and how much in commissary goods or otherwise, if any of them were paid in different ways, will you do so?

A. I will, and mark it Exhibit —.

Q. I show you the two notes signed by Joseph Coyne to Allen & Jamison Company referred to in other examinations, one dated July 18th, 1901, and one dated July 18th, 1901, are those the original notes? If so, will you file them as exhibits to your deposition?

147 A. They are. I do file them and mark them Exhibits —.

Q. I show you the note dated April 8th, 1901, signed Willard & Cornwell, by Joseph Coyne, also by Joseph Coyne to the Merchants National Bank of Tuscaloosa, Alabama, and endorsed by Allen & Jamison Company, being one of the notes referred to in previous examination, state if that is the genuine note, and if so mark it Exhibit —?

A. I do and mark it Exhibit —.

Examination of R. P. PROWELL continued by Henry Fitts, counsel for plaintiff, under stipulation set out on page 27 of this deposition:

Q. Upon the previous adjournment of this examination you were supplied with a list of statements called for by the complainant, and I now ask you if you have those statements made in the form to be attached to this deposition as exhibits?

A. I have these statements in the form of pencil memoranda, as well as they can be made.

Q. Will you please give us the statement of the total amount of money actually disbursed by Hardaway & Prowell during the progress of this work?

A. $57,410.59.

Q. Have you a detailed and itemized statement of these disbursements?

A. I have. I attach this as Exhibit "A. A." to my deposition.

Q. This statement consists merely of deposits and checks on the Merchants National Bank of Tuscaloosa, without showing the persons to whom the checks were drawn nor for what the checks paid, have you a statement showing to whom the several items were paid and for what they were paid?

A. That can be gotten. I have them only in my books. They can be gotten by the original entries on the books.

Q. Since you have not this information prepared in the form of a tabulated statement, kindly give specific reference to the book and the pages of the book in which these can be found.

A. From start to finish with the dates on the bank statement, the dates of same on the bank statement will correspond with the dates in the books.

Q. Then am I to understand that you have not in your books a consecutive statement of cash expended, giving the items to whom it was disbursed?

148 A. That is not a fact, there is a statement showing every transaction.

Q. Where is it?

A. In the Journal and Ledger.

Q. On what page or pages of the ledger or journal is this shown?

A. Various pages of the Journal, from 1 to 113.

Q. Then does the Journal include all of the items going to make up the $57,410.59 shown on the bank statement?

A. It does.

Q. Will you file this journal in court?

A. That will be submitted to the commissioner.

Q. Then the amount of $57,410.59 includes every disbursement made by Hardaway & Prowell during the progress of this work on all accounts?

A. All accounts.

Q. How much of the last named sum of money was paid out for merchandise as distinguished from material entering into the physical construction of the lock?

A. $6939.18.

Q. What were the profits realized on conducting the commissary?
A. $1250.24.
Q. How do you arrive at that profit?
A. Your merchandise or commissary account on the ledger shows this.
Q. What is the amount of labor claim paid in merchandise and as distinguished from cash?
A. 8189.42.
Q. Where is this shown?
A. Our books show we purchased $6939.18 and that our profits were $1250.24, which makes the gross sales $8189.42.
Q. This is the only method you have of how much of labor was paid in commissary supplies?
A. Yes, sir.
Q. How much cash was disbursed by Hardaway & Prowell in payment of labor?
A. $31,871.69.
Q. The total amount expended for labor is, then, $40,061.11?
A. Yes.
Q. How do you arrive at the amount paid to the laborers in cash or by checks on the bank, as distinguished from the amount you paid in merchandise?
149 & 150 A. By your commissary account which shows the amount of groceries bought and money paid laborers.
Q. Explain your commissary or merchandise account, stating what is included in it and the general method in which the account is kept?
A. Merchandise or commissary account is composed of the gross pay roll credited to commissary account, all groceries and money paid laborers is charged to this merchandise or commissary account

* * * * * * *

151 Q. Mr. Prowell do you know what the Government ten day reports are?
A. I am not familiar with them.
Q. Have you prepared and ready for filing with this deposition a statement of the outstanding indebtedness of Hardaway & Prowell showing to whom those debts are due?
A. I have. I file this as "Exhibit B. B." to this deposition.
Q. The total amount of this outstanding indebtedness is what?
A. $24,764.70.
Q. The amounts of $7939.34 to B. H. Hardaway and of $4469.64 to R. P. Prowell are the amounts which those gentlemen respectively contributed to the business as has already been explained in this deposition?
A. Yes up to the time that this claim was filed.
Q. You have an item of $6810.56 for bills payable?
A. That is due the bank on outstanding notes.
Q. In regard to the item of $3480.96 due Allen & Jamison Co., that is the amount now due and owing to that company for cement which entered into the work, isn't it.

A. And other material.

Q. Allen & Jamison Co., hold against Hardaway & Prowell two separate accounts, one a merchandise account and one a cement account, is this amount shown upon the cement account or the merchandise account?

A. Both.

Q. This amount as shown to be due to the banks and listed in your statement as bills payable is money borrowed from the bank for the purpose of financing this contract?

A. It is.

152 Q. And was lent by the bank on the paper of you and Mr. Hardaway?

A. Hardaway & Prowell.

Q. Were there any other obligators to that paper?

A. No.

Q. Have you furnished all of the statements called for upon your original examination, and which you undertook to furnish during that examination which you are able to supply?

A. I have.

Q. The total amount shown by the bank statement which you have filed as Exhibit — to this deposition includes, does it not, checks drawn against the firm account in favor of the members of the firm in payment of the fifteen per cent. compensation contracted for with Coyne?

A. It does not show any check drawn by Hardaway & Prowell to either B. H. Hardaway or R. P. Prowell except in one instance where R. P. Prowell was paid back one temporary loan.

Q. Was not the money put into the business by Hardaway & Prowell separately, and which you have listed in the outstanding indebtedness of Hardaway & Prowell, deposited in the bank, and were not these checks as listed in the statement drawn against the money so deposited?

A. The entries on the book show amounts furnished by the different partners, but in some instances money from both partners was deposited at one time.

Q. But it all went into and through the bank?

A. Not all of it, no sir. All except the two items amount- to $1826.70 at the foot of the statement.

Q. What was done with that $1826.70?

A. It was paid out in pay rolls and materials direct.

Q. From time to time as you took in money at the commissary or as you received money from the Government estimates you made deposits in the bank did you not?

A. The money received from Willard & Cornwell I did.

Q. Through the Government check?

A. Yes and some through money.

Q. This money you deposited?

A. Yes.

Q. During the progress of your business didn't you from time to time borrow money from the bank and deposit the amount so borrowed?

A. I did.

Q. Then when you came to pay that money back did you not in some, if not all, instances make that payment by a check on your account?

153 A. In some instances we did.

Q. The discounts upon renewals of loans were paid by checks included in this statement, were they not?

A. Some were and some were paid by individuals.

Q. Running through this bank account I find deposited amounts like $650, $100, $496.33 and even smaller amounts, from what sources was the money deposited derived?

A. The checks from the individuals and from drafts.

Q. What do you mean by drafts?

A. Drafts on the individuals.

Q. That the only methods?

A. Others that I don't remember now.

Q. Let's take this deposit of $493.33 made on Sept. 1, 1903, and tell us where this money came from?

A. That was a thirty day paper.

Q. That was a loan from the bank?

A. Yes, sir.

Q. There are also included in this bank statement numerous checks paid by Hardaway & Prowell to Joseph Coyne at the time you secured his endorsement of the Government checks are there not?

A. Some.

Q. In your former examination you testified relative to your first meeting with one Wm. E. Riley, please fix as definitely as possible the date of that first meeting with him?

A. I have stated before in my former testimony as near as I remember at the present.

Q. Wasn't it late in the summer of 1904?

A. Couldn't say positively.

Q. Can you say what year it was in?

A. I have stated in my former testimony.

Q. How long had Hardaway & Prowell been conducting this work at the time of your first meeting with Wm. E. Riley?

A. Couldn't say exactly.

Q. State approximately.

A. We started the work in June, 1903, and Riley was here to the best of my recollection in 1904.

Q. What part of the year 1904?

A. I wouldn't say.

Q. Was the weather warm or cold?

A. Couldn't say.

Q. Don't you remember riding down the Black Warrior River in a skiff from the work to Holt with him that night of the first meeting?

154 A. Yes, I do.

Q. Don't you remember that the weather was warm?

A. Don't remember that.

Q. You can't say whether this was in the spring, summer or fall of 1904?

A. I wouldn't say positively what date.

Cross examined by Mr. C. B. VERNER, of counsel for Claimants:

Q. Mr. Prowell, you were asked to make out a statement showing the number of cubic yards of stone in different shape such as the contract with the Government required to be furnished in the lock and dam, and a list of these items with other items which the Government contracted to pay the contractors certain amounts for each item, have you made out such a list as that?

A. I have.

Q. Is that the list?

A. It is.

Q. Will you attach that to your deposition and mark it so that it can be identified?

A. I will, and mark it Exhibit 1.

Q. Is that a correct list of all of the items that you furnished?

A. It is.

Q. What was the total cost of all those items that you put in there it is footed up there is it?

A. Yes.

Q. And you have added to that the 15 per cent.

A. Yes, sir.

Q. Mr. Prowell, in arriving at the cost of these items that were furnished did you reach that cost by adding up all of the items for labor and material and other expenses as shown and set out item by item in the certified copy of the account heretofore filed in this case?

A. I did.

Q. Did you pro rate these items among these articles here that you furnished?

A. I did.

Q. Did everything that you have in that statement marked Exhibit No. 1 go into, and is it now a part of, Lock No. 4 in the Black Warrior River?

A. It is.

Q. In furnishing these q-oins, this coping, this excavating and in fact in doing all this work as shown in this statement, did you have to employ stone cutters?

A. I did.

Q. Stone masons?

155 A. I did.

Q. Day laborers?

A. I did.

Q. Timekeepers?

A. I did.

Q. Superintendents?

A. I did.

Q. And all those items go to make this amount as shown in Exhibit No. 1?

A. They do.

Q. These number of cubic yards of work done here and thousand feet as they are shown to be here are taken from the estimates of this work furnished you by the Government are they not?

A. It is.

Q. Is that the pay roll furnished you by Mr. Fincher for May 19, 1904?

A. It is. I attach this to my deposition and mark it Exhibit No. 2.

Q. Was the $1,000.00 that Mr. Hardaway furnished by a check which was not deposited with the Merchants National Bank used to pay the pay roll at that date?

A. It is.

Q. Does that article appear in the journal at any place you can locate?

A. Not except in the gross pay rolls.

Q. Taking this list of deposits and checks from the Merchants Bank which shows up a total business of something over $55,000 and then the $1800 furnished by you and Mr. Hardaway that never went through the bank, which makes a total of over $57,000, that does not represent the full total of the business done in dollars and cents does it?

A. Does not.

Q. In order to arrive at the full total of the money turned over or credit which is in the completion of this work you will have to add to this total of $57,410.59 the sum of $24,764.70, the present indebtedness of the firm, making $82,175.29.

A. It does.

Q. Mr. Prowell, that difference between the cost of completing this job and the amount of money turned over is made up of the amount of money that is now due the individuals composing the firm, you and Mr. Hardaway, and what money that you paid back to the bank, was it not?

A. Yes, and to some of the creditors too.

156 Q. Mr. Prowell, these estimates as they are put down here, are they not also shown by the government's books?

A. They are.

Q. Does not the amount of your pay rolls and the amount of money that you expended for labor and for material as shown in this statement from Merchants National Bank, and as shown by your books correspond?

A. They do.

Q. You didn't have anything to do with keeping these books at the Merchant's National Bank, did you?

A. None whatever.

Q. You have never drawn any money out of this to pay for your personal services have you?

A. None.

Q. Has Mr. Hardaway?

A. No.

Q. In answer to the question heretofore asked you by Mr. Jno. B. Baskin, one of the attorneys for claimants, have you prepared a statement showing the different items of the account of Allen & Jamison Company that is on file in this cause, which, according to your knowledge, information and belief actually went into the construction of Lock No. 4, Black Warrior River?

A. I have.

Q. Is that the statement there?

A. Yes.

Q. You swore to that as true to the best of your knowledge, information and belief?

A. I did.

Q. Does this statement show a complete list of the items furnished that went into the construction of that lock according to your best judgment and knowledge?

A. It does.

Q. Will you file it as a part of your deposition and mark it Exhibit No. 3.

A. Yes.

Q. Mr. Prowell, have you now in your possession all of the books that were kept by the firm of Hardaway & Prowell during the completion of Lock No. 4?

A. I have.

Q. Will you send these books to your attorney at Louisville so that they can be used by the Special Master in this matter?

A. I will.

Q. With instructions to him to allow the Special Master the use of them?

A. I will.

157 Q. In your ledger just the dates and amounts are put down are they not, and the letter "J" stands for Journal, does it not?

A. Yes.

Q. And the figures between the two red lines following the J show the page of the journal where the item is charged on the journal?

A. It does.

Q. The journal shows to whom the money for the item was paid and from whom you got the money or material, shows a complete history of the transaction?

A. Yes, sir.

Q. In furnishing this stone coping, quoins, masonry and other kind of stone work, didn't you have to use sand, gravel and cement?

A. I did. And lumber, and poles, and nails, iron bars, bolts, and spikes.

Q. All of these things were necessary for the assembling of these different items that were put into the lock and making them a part of the lock, were they not?

A. Yes.

Q. And the cost of these items was a part of the general cost of these items shown in Exhibit No. 1.
A. Yes, sir.

R. P. PROWELL.

The depositions of Marcus B. Long, F. L. Crittenden and Alex. H. Byrd are as follows:

MARCUS B. LONG, a witness produced on behalf of the complainant, being duly sworn, deposes and says as follows:

Examined by HENRY FITTS, attorney for complainant:

Q. Mr. Long, you are a United States Engineer engaged in the service of the government on the Warrior River?
A. I am.
Q. Were you the resident engineer or inspector in charge of the building of Lock No. 4 during or at the time that Hardaway & Prowell were completing the work?
A. I was.
Q. Will you please explain in a brief but clear way what are ten day reports made by the inspector to the Assistant Engineer in charge of the river work as these reports relate to labor?

Solicitor objected to this question upon the ground that it is immaterial and irrelevant, and calls for immaterial and irrelevant testimony, and objects to the answer upon the same grounds.

158 A. Ten day reports are made up from the labor that is actually engaged in the work during the day. Each day a person will go over the work and count the men actually at work on each particular work and that is recorded each day, and every ten days this is all compiled in one report and one of these reports is sent to Mobile and the other is sent to the assistant engineer at Tuscaloosa. Also this report takes up what work is done during the day, every item of work during the day. In the evening the inspector on the work measures up loosely what has been done under his supervision and that is placed on this report and at the end of the month the last ten day report the work is measured up carefully and accurately, and if it overrules in this estimate it is deducted from the last ten day report, and if it falls short there is enough added to make it conform with the accurate measurement for the month.
Q. In compiling these ten day reports the number of laborers on the work are actually counted each day?
A. Yes, sir.
Q. And a record is kept of the number of men at work each day?
A. Yes, sir.
Q. In this ten day report is any record kept of men working parts of days, or less than whole days?
A. Yes, sir, for instance you will take up the force in the morning and in the afternoon you take the force up again. You count the men in the morning and then count them in the afternoon, and what is actually at work during the day is placed in this ten day

report, in the daily report, and then these daily reports make the ten days reports.

Q. The men are counted twice each day?

A. Yes, morning and afternoon.

Q. These ten day reports as made by you to the engineer superior to you contain at their bottoms under the tabulated portions, statements telling what work was in progress, stating the various different employments in which men were engaged, stating that men are engaged in the woods getting timber, that they are engaged in operating scows getting out sand and gravel; I wish to inquire whether the counting of the men in the ten day reports show the men employed in all these different employments, or whether it simply includes the men on the work proper?

Claimant objects to this question upon the ground that it is immaterial and irrelevant and calls for immaterial and irrelevant testimony.

159 A. These ten day reports, that portion underneath the tabulated statement that you have referred to, is a kind of a diary or history of what has been done during that day. In building the dams and locks and everything there—they have a quarry, transporting stone back and forth from the quarry, and everything of that sort, bringing material to put in the work and things of that sort, is recorded in those ten day reports.

Q. Does your report include the men engaged in all of these different things?

A. In the different branches of carrying on the work there, yes, sir.

Q. These ten day reports are a part of the record kept by the Government in its general office at Mobile?

A. Yes, sir.

Q. And the Mobile office to which reference is made is the Government office from which all of the work on the Warrior and Black Warrior Rivers are supervised and controlled, is it not?

A. Yes, sir.

Cross-examined by C. B. VERNER, attorney for claimant:

Q. Mr. Long, didn't Mr. Josh Baker haul some sand there and gravel?

A. Yes, sir.

Q. Do you mean to say that the Government took a list of all the hands that Josh Baker had on his boat?

A. No, sir; nothing that Josh Baker had.

Q. Did the Government keep a list of the men that worked in the sand pit?

A. Down here at Tuscaloosa.

Q. Yes, sir.

A. No, sir.

Q. Did they keep a list of the men at work in the gravel pit?

A. No, sir; not as long as I had charge of it.

Q. Did the Government keep a list of all the men that worked in the quarry?

A. Yes, sir; all up at Tidewater.

Q. Did you make those reports yourself?

A. Yes, sir; when I was there, sometimes my assistant.

Q. You couldn't tell now which ones you made yourself?

A. No, sir.

Q. Who was in charge of this work up there?

A. I was in charge of the work. I had under me an inspector and a recorder. Sometimes a recorder did, it was generally
160 his business while I was there to take up the time of the men.

Q. Where are the original entries as to these laborers up there?

A. We have some of them in the office here at Tuscaloosa.

Q. I don't mean the copies which you have made, those which you send copies to Mobile, I mean those original entries made by the recorder, by you or by an inspector?

A. They are on file here in Tuscaloosa.

Q. Were they made by actual count or from an estimate?

A. They were actually counted.

Q. Don't you remember up there a time when Mr. Coyne, it was reported, had only a certain number of men, about sixty, and the work was stopped; that Capt. Cosby came up there himself and counted them and they had 120?

A. I never heard that.

Q. They did have a good deal of squabbling about the amount of work that he had done, and about his labor?

A. It may have been before I took charge of it, but I never heard it while I was there. I took charge August 11th, 1902.

Q. Who all helped to make these ten day reports that you are talking about?

A. As I say, we had a recorder.

Q. Who was he?

A. Mr. Richard Snow was recorder up there for awhile and then we had Alex Bird, then Mr. E. L. Crittenden, inspector.

Q. Any one else?

A. For a short time up there I had Mr. Frank Freeman up there for about a month.

Q. Is there any one else that you can remember now, was Sam Friedman up there?

A. No, sir.

Q. What did he do up there?

A. I never heard of him. Mr. Tim Crowley was the inspector in the yards, stone inspector.

Q. You never sent the original daily counts of these men to the Mobile office did you?

A. Here's what I meant by the daily count: We kept a force book each day the daily forces were put down there.

Q. Did you put the names?

161 A. No, we put so many laborers, so many cutters, so many masons, so many engine men, &c. &c.

Q. Did you put the superintendent?
A. Yes, we put the superintendent.
Q. Did you keep the bookkeeper?
A. No, sir.
Q. Did you keep the commissary man?
A. No, sir.
Q. Did you keep all the foreman and engine men.
A. Yes, sir, all that were actually on the work.
Q. And you put down what their wages were?
A. No, sir; the men who worked in the commissary, the bookkeeper, etc., we didn't count it at all, but we took force account every day of the men who were actually at the work.
Q. You kept a man at the quarry?
A. Kept one at every place where they were working.
Q. Did you keep an account of the men working on the barges?
A. Yes, sir; they were counted in the barges same as they were in the quarry, and out at the dam, and the abutment and on the lock.

Examined in rebuttal by HENRY FITTS, for Complainant:

Q. Mr. Long, you said that these ten day reports did not include the men that worked in a sand pit or gravel pit, explain why these men were not included in the ten day reports as laborers on the work?
A. As I understand it, these gravel and sand pits that you refer to are near Tucaloosa, and that these were operated by Baker, by contract, and we didn't consider that a portion of the work of Willard & Cornwell at the locks and we didn't keep any account of it. That was contract work done by Baker for so much a yard to Willard & Cornwell.
Q. This contract was carried on the Government books as the contract of Willard, Cornwell always?
A. As Williard & Cornwell?

Cross-examined by C. B. VERNER, for claimant:

Q. That property up there has been received, hasn't it, by the Government?
A. Yes, sir.
Q. It was received under the contract as made originally with Willard & Cornwell, wasn't it?
A. Yes, sir; I suppose so, it has been received.
Q. The reports that you made were made that way?
162 A. Yes, sir; as Willard & Cornwell.
Q. Hardaway & Prowell put in a lot of stone in that dam and furnished other material?
A. Yes, sir, they furnished material and finished up the work of Willard & Cornwell.
Q. They were engaged in the work how long, to the best of your knowledge?
A. I think that their first work was done in June, 1903.
Q. And they finished it up in the fall of 1904?
A. Yes, sir.

MARCUS B. LONG.

Copies of the ten day reports referred to in the evidence of Marcus B. Long and filed before the Special Master and marked Exhibit No. 5 are as follows:

163 Improvement Black Warrior River, Ala.,

Lock and Dam No. 4.

Report of Work from Oct. 1st to 10th, Inclusive, 1904.

Under Contract Dated September 28, 1899. Contractors, Willard & Cornwell.

Date	Masonry: Quoins	Coping	Pointed Face	Rock Face Rubble	Dry Rubble	Excavation	Rock Excavation	Embankment	Stone Filling	Paving	Rip Rap	Puddling	Bolt Holes in Masonry	Miter Sills	Framed Timber	Sheathing	Remarks
Cubic Yards									Lin. Ft.						B. M. Feet		
1				25												13	
2				20												11	
3				30												15	
4				45												23	
5																	
6																	
7																	
8				15			15									8	
9																	
10				20												10	
Totals				155			15									80	

Report of Force Employed by Contractors.

Date	Superintendents	Foremen	Time-keepers	Masons	Stone-cutters	Machinists	Blacksmiths	Carpenters	Derrickmen	Enginemen	Laborers	Boys	Teams	Engines	Steam Hoists	Steam Pumps	Derricks	Steam Drill	Remarks
1	1	1	1	4			1			2	20	1		2	2	1	2		
2	1	1	1	4						2	14	1		2	2	1	2		
3	1	1	1	4			1			2	20	1		2	2	1	2		
4	1	1	1	4			1			2	22	1		2	2	1	2		
5	1	1	1	4			1			2	20	1		2	2	1	2		
6	1	1	1	4			1			2	19	1		2	2	1	2		
7	1	1	1	4			1			2	16	1		2	2	1	2		
8	1	1	1	4			1			2	14	1		2	2	1	2	1	
9	1		1																
10	1	1	1	4			1			2	15	1		2	2	1	2		
Totals	10	9	10	36			8			18	160	9		18	18	9	18	1	
Av'age	1	1	1	4			1			2	178	1						Total	28.8

Supplementary Statement of Progress of Work.

I have the honor to report further as follows: A force of masons and laborers were employed in laying rubble masonry on dam, also a force employed in cutting dam stone for down stream face of dam. A force boating stone from quarry to dam. A force blasting a trench in bottom for masonry of dam.

Probable operations for the next 10 days. Will continue laying masonry on dam. Will continue blasting trench and boating stone and doing such other work that may be required.

I certify that the above is correct.

MARCUS B. LONG, *Inspector.*

164 Improvement Black Warrior River, Ala.,

Lock and Dam No. 4.

Report of Work from Oct. 11th to 20th, Inclusive, 1904.

Under Contract Dated September 28, 1899. Contractors, Willard & Cornwell.

Date	Masonry: Quoins	Masonry: Coping	Masonry: Pointed Face	Masonry: Rock Face	Masonry: Rubble	Masonry: Dry Rubble	Excavation	Rock Excavation	Embankment	Stone Filling	Paving	Rip Rap	Puddling	Bolt Holes in Masonry	Miter Sills	Framed Timber	Bbls. Cement	Remarks
Cubic Yards										Lin. Ft.						B. M. Feet		
11					10			5									5	
12					20			10									13	
13					15												14	
14																		
15																		
16																		
17					25												14	
18																		
19					10				12								6	
20					25												15	
Totals					105			15	12								67	

Report of Force Employed by Contractors.

Date	Superintendents	Foremen	Time-keepers	Masons	Stone-cutters	Machinists	Blacksmiths	Carpenters	Derrickmen	Enginemen	Laborers	Boys	Teams	Engines	Steam Hoists	Steam Pumps	Derricks	Steam Drill	Remarks
11	1	1	1	4			1			2	16	1		2	2	2	2	1	
12	1	1	1	4			1			2	17	1		2	2	2	2		
13	1	1	1	4			1			2	16	1		2	2	2	2		
14	1	1	1	4			1			2	12	1		2	2	2	2		
15	1	1	1	4			1			2	14	1		2	2		2		
16	1		1																
17	1	1	1	4			1			2	15	1		2	2	1	2		
18	1	1	1	4						2	14	1		2	2		2		
19	1		1	4						2	14	1		2	2	1	2		
20	1		1	4			1			2	16	1		2	2		2		
Totals	10	7	10	36			7							18	18	10	18	1	
Av'age	1	0.78	1	4			0.78									Total Av.			25.45

Supplementary Statement of Progress of Work.

I have the honor to report further as follows: A force of masons and laborers were employed in laying masonry on dam and a force boating stone from quarry to dam also a force ½ day grading behind lock and chinking guard crib with spalls.

Probable operations for the next 10 days. Will continue laying masonry on dam. Will finish grading and finish chinking guard crib with spalls. Will complete rip-rap and paving, clear away rubbish and finish up the work generally.

I certify that the above is correct.

MARCUS B. LONG, *Inspector.*

165 Improvement Black Warrior River, Ala.,

Lock and Dam No. 4.

Report of Work from October 21st to 31st, Inclusive, 1904.

Under Contract Dated September 28, 1899. Contractors, Willard & Cornwell.

Date	Masonry: Quoins	Coping	Pointed Face	Rock Face	Rubble	Dry Rubble	Excavation	Rock Excavation	Embankment	Stone Filling	Paving	Rip Rap	Puddling	Bolt Holes in Masonry	Miter Sills	Framed Timber	Bbls. Cement	Remarks
	Cubic Yards										Lin. Ft.					B. M. Feet		
21					30												16	
22																		
23																		
24									10									
25									15		6.6	10.8						
26					15				20								6	
27					20												14	
28					10											300	5	
29					20.9				3							474	10	
30																		
31																		
Totals	x 05	x 03	x 0.7	x 0.5	95.9	-0.5		x 247.1	48	-42	66	x 420 / 52.8		x 12		774	51	

Report of Force Employed by Contractors.

Date	Superintendents	Foremen	Time-keepers	Masons	Stone-cutters	Machinists	Blacksmiths	Carpenters	Derricknen	Engineemen	Laborers	Boys	Teams	Engines	Steam Hoists	Steam Pumps	Derricks	Steam Drill	Remarks
21	1			1	4					2	14	1			2	2		2	
22	1			1	3					2	13	1			2	2		2	
23	1			1															
24	1			1	3					2	9	1			2	2		2	
25	1			1	3					2	9	1			2	2		2	
26	1			1	3					2	12	1			2	2		2	
27	1				4					2	15	1			2	2		2	
28	1				4					2	15	1			2	2		2	
29	1				4					2	15	1			2	2		2	
30	1																		
31	1									2	11	1			2	2		2	
Totals	11			6	28					18	113	9			18	18		18	
Av'age	1			0.67	3.11					2	12.55	1				Total Av.		20.33	

Supplementary Statement of Progress of Work.

Material	On hand Oct. 1st	Rec'd in Oct.	Expended in Oct.	On hand Nov. 1st.
Cement accepted, bbls.	146	52	198	
Rough Stone Cu. yds.	409		409	
Framed Timber Ft. B. M.	1883		1883	

I have the honor to report further as follows: The masonry in the lock, abutment and dam is completed. The dam is completed except 3704 Ft. B. M. of framed timber to be used as coping for dam and a steel plate ½ in. x 10 in. to go the entire length of dam. Guard crib is completed except two angle irons, one to be placed at each end of crib. 42 cubic yards of stone filling given in previous estimates should have been given in as rip-rap, being the upper 15 inches of guard crib. All the work is completed except some grading behind lock and some excavation at lower end of lock in channel, also tearing out coffer dams which obstruct navigation, and also destroying some sunken barges which are a menace to navigation.

I certify that the above is correct.

MARCUS B. LONG, *Inspector.*

166 Improvement Black Warrior River, Ala.,

Lock and Dam No. 4.

Report of Work from Nov. 1st to 10, Inclusive, 1904.

Under Contract Dated September 28, 1899. Contractors, Willard & Cornwell.

	Masonry																				
Date	Quoins	Coping	Pointed Face	Rock Face	Rubble	Dry Rubble	Excavation	Rock Excavation	Embankment	Stone Filling	Paving	Rip Rap	Puddling	Bolt Holes in Masonry	Miter Sills	Framed Timber	Sheathing	Remarks			
	Cubic Yards										Lin. Ft.					B. M. Feet					

Report of Force Employed by Contractors.

Date	Superintendents	Foremen	Time-keepers	Masons	Stone-cutters	Machinists	Blacksmiths	Carpenters	Derrickmen	Enginemen	Laborers	Boys	Teams	Engines	Steam Hoists	Steam Pumps	Derricks	Steam Drill	Remarks
1	1										12	1							
2	1										12	1							
3	1										8	1							
4	1										8	1							
5	1										7	1							
6	1																		
7	1										9	1							
8	1										3	1							
9	1										9	1							
10	1										11	1							
Totals	10										79	9							
Av'age	1										8.78	1							Total Av. 10.78

Supplementary Statement of Progress of Work.

I have the honor to report further as follows: A force was employed in putting on wooden coping on dam which has been previously estimated, which completes the dam. Also tearing out coffer dam above the dam and removing derricks and machinery from the dam, and also cutting the whalings in the coffer dam below.

Probably operations for the next 10 days. Will continue removing the machinery and also grading behind the lock and doing such other work that may be required.

I certify that the above is correct.

MARCUS B. LONG, *Inspector.*

167 Improvement Black Warrior River, Ala.,

Lock and Dam No. 4.

Report of Work from Nov. 11th to 20th, Inclusive, 1904.

Under Contract Dated September 28, 1899. Contractors, Willard & Cornwell.

Date	Masonry: Quoins	Coping	Pointed Face	Rock Face	Rubble	Dry Rubble	Excavation	Rock Excavation	Embankment	Stone Filling	Paving	Rip Rap	Puddling	Bolt Holes in Masonry	Miter Sills	Framed Timber	Sheathing	Remarks
	Cubic Yards										Lin. Ft.				B. M. Feet			
11									20									
12									15									
13																		
14										4								
15									20									
16																		
17																		
18																		
19																		
20																		
Totals									55	4								

Report of Force Employed by Contractors.

Date	Superintendents	Foremen	Time-keepers	Masons	Stone-cutters	Machinists	Blacksmiths	Carpenters	Derrickmen	Enginemen	Laborers	Boys	Teams	Engines	Steam Hoists	Steam Pumps	Derricks	Steam Drill	Remarks
11	1										12								
12	1										11								
13	1																		
14	1										9								
15	1										11								
16	1										14								
17	1										12								
18	1										12								
19	1										12								
20	1																		
Totals	10										93								
Av'age	1										11.63								Total Av. 12.63

Supplementary Statement of Progress of Work.

I have the honor to report further as follows: A force was employed in gathering up old machinery and taking down derricks, also a force grading behind the lock, and also a force getting rock out of channel below lock, and removing old coffer dam below lock.

Probable operations for the next 10 days. Will continue grading behind lock and taking out the rubbish in channel at lower end of lock destroying old barges and doing such other work that may be required.

I certify that the above is correct.

MARCUS B. LONG, *Inspector.*

168 Improvement Black Warrior River, Ala.,

Lock and Dam No. 4.

Report of Work from November 21st, to 30th, Inclusive, 1904.

Under Contract Dated September 28, 1899. Contractors, Willard & Cornwell.

Date	Masonry: Quoins	Coping	Pointed Face	Rock Face	Rubble	Dry Rubble	Excavation	Rock Excavation	Embankment	Stone Filling	Paving	Rip Rap	Puddling	Bolt Holes in Masonry	Miter Sills	Framed Timber	Bbls. Cement	Remarks
	Cubic Yards										Lin. Ft.				B. M. Feet			
21									30									
22									40									
23									35									
24																		
25																		
26																		
26																		
27																		
28																		
29																		
30									130.2									
									235.2		1.2							

Report of Force Employed by Contractors.

Date	Superintendents	Foremen	Time-keepers	Masons	Stone-cutters	Machinists	Blacksmiths	Carpenters	Derrickmen	Enginemen	Laborers	Boys	Teams	Engines	Steam Hoists	Steam Pumps	Derricks	Steam Drills	Remarks
21	1										10								
22	1										10								
23	1										10								
24	1																		
25	1																		
26	1																		
27	1																		
28	1										9								
29	1										9								
30	1										7								
Totals	10										55								
Av'age	1										6								Total Av. 7

Supplementary Statement of Progress of Work.

I have the honor to report further as follows: A force was kept grading behind lock wall which was completed, also a force machinery off of the work. All the work is completed except a 1 4 in. x 10 in. steel plate on dam and two angle irons on each end of crib and taking out a portion of old coffer dam in channel at lower end of lock.

I certify that the above is correct.

MARCUS B. LONG, *Inspector.*

169 F. L. CRITTENDEN, a witness produced on behalf of the complainant, being first duly sworn, deposes and says as follows:

Examined by HENRY FITTS, of counsel for complainant:

Q. Mr. Crittenden, what is your business?

A. I was inspector up there on the work of the Government at Lock 4.

Q. How long were you inspector there, between what dates?

A. I think I went there in July or Aug. 14th, it will be four years this coming August. About three and a half years.

Q. You went there in July or August, 1902?

A. Yes, sir.

Q. And continued there until the completion of the work?

A. Yes, sir.

Q. Then you were inspector upon that work all of the time which intervened between June 1, 1903 and the completion of the work?

A. Yes, sir; I was there all the time.

Q. Your service as inspector covered the entire time, did it not, during which Hardaway & Prowell were engaged in working there?

A. I was.

Q. You were an employé of the government of the United States?

A. Yes, sir.

Q. Are you familiar with the ten day reports made by the Government Engineers upon the progress of that work?

A. Yes, sir.

Q. State how those reports are compiled with reference to the number of laborers employed upon the work?

A. We took the number of men twice a day, counted the men twice a day each day and at the end of those ten days they were averaged for that period.

Q. During this entire time of Hardaway & Prowell's work, who did the counting of the men as the count was put into the ten daily reports?

A. Mr. Long a portion of the time, myself some, and Alex Bird.

Q. Was the counting of the men which you did accurate and careful?

A. Exact.

Q. How long was Mr. Bird there?

170 A. I think it was a portion of four months, three and a portion of the fourth month. He was there September, October, November and part of December. He left just before Christmas.

Q. That was in the year 1903?

A. Yes, sir. I can't be positive about those dates.

Q. Then during all of the time, except those three or four months during which Mr. Bird was on the work this actual counting was done either by you or by Mr. Marcus Long?

A. Yes, sir.

Q. Did this count include the men engaged in the woods getting out timber, or working upon scows getting sand and gravel?

A. It did not include the men he had down here at Tuscaloosa furnishing under contract. This was only on the yard. Sometimes he had men getting timber under contract, but when he sent a foreman with men to get timber we included them.

Q. These reports do not include men engaged under sub-contractors getting timber or sand?

A. All men that reported for their meals or were in camp there. It included the quarry, blacksmith shop, machinists and all laborers on the job there.

Q. It also included men especially detailed to do work off the reservation?

A. Yes, sir.

Q. Mr. Crittenden, did you know Thomas Finnegan?

A. Yes, sir.

Q. What did he do up there?

A. He was by profession, I reckon you would call him a stone

cutter. He was foreman of the masons awhile and worked as a mason himself awhile.

Q. What did Tony Palori do?

A. Tony was kind of helper to the masons. He did light work, work where a skilled man wasn't needed, such as back filling.

Q. What did J. J. Ivy do?

A. Ivy was a mason by trade.

Q. Ben Arrant?

A. He was a foreman, sort of general utility man I suppose.

Q. William Webster?

A. I don't remember Webster, he must have been nothing more than laborer.

Q. Jim Staten?

171 A. My recollection of him is that he was the cook's helper in the kitchen.

Q. Sol Flullen?

A. Don't remember him.

Q. John Flullen?

A. Don't remember him.

Q. Now, as I understand the progress of this work quite a considerable amount of timber was used by the contractors in the building of coffer dams and in support for the concrete and masonry work?

A. More for the coffer dam, didn't use any forms in there for concrete at all.

Q. Was this timber which was used in the necessary progress of the work, but which did not remain a part of the work when completed included in the work allowed and paid for by the Government estimates?

A. I don't think so. I know the coffer dam wasn't. They did allow them for sheathing used.

Q. I don't think you understand the question. Of course, the contract price included the coffer dam, but each month estimates of the material supplied and put upon the ground were made as a gauge by which the contractor drew his *pro tanto* payment. In making up these monthly estimates for partial settlements, were not statements for all timber used for temporary purposes?

A. I don't think so. This was in Mr. Long's jurisdiction. That was more directly under his charge. I assisted him, but it was more of a check after he made the estimates. I don't think they paid for coffer dams, but all permanent material they paid for as soon as it was accepted.

Cross-examined by C. B. VERNER, of counsel for claimants:

Q. Mr. Crittenden, is it not a fact that the cost of building the dam across the river up there is made up of certain items, one of those items being the cost of putting in the coffer dam? If you were going to build a dam across the river up there, isn't it necessary to build a coffer dam, and if you were going to figure out what you were going to put in the stone at per cubic yard, you would have to figure the cost of that coffer dam?

A. Yes, sir.

Q. But when the Government made estimates at the end of the months, is it not true that the Government only allowed for the actual stone put into the lock and dam?

A. I am not competent to answer, that was under Mr. Long.

172 Q. They didn't allow for the coffer dam?

A. I don't know.

Q. Who made the estimates?

A. Mr. Long.

Q. Did you ever see any of them?

A. Yes, sir.

Q. In whose names were those estimates turned over to the Government?

A. Willard & Cornwell.

Q. Joseph Coyne was never known by the Government as the contractor up there?

A. No, sir; we recognized him as the representative of the firm there.

Q. As representative of the firm of Willard & Cornwell?

A. Yes, sir.

Q. The Government never made any estimate up there to Hardaway & Prowell, did they?

A. I think they were all turned in as Willard & Cornwell.

Q. Mr. Crittenden, isn't it a fact that Hardaway & Prowell had stone quarried and put in the dam up there?

A. Yes sir.

Q. Isn't it a fact that they furnished cement that went into the dam?

A. Yes, sir.

Q. Isn't it a fact that they furnished sand and gravel?

A. Yes, sir.

Q. Isn't it a fact that they furnished bolts, sheet iron etc.?

A. They furnished the sheet iron, but it has never been put in.

Q. It is not their fault it was not put in?

A. I don't know. I think it was agreed between them and Mr. Long that if they would do certain work for the Government in building a coffer dam for the gates, he would put the sheet iron in for Hardaway & Prowell.

Q. Didn't they also furnish some permanent timber that was used?

A. Yes, sir.

Q. The government received that lock and put the estimates in Willard & Cornwell's name?

A. Yes, sir.

Q. They were given estimates on all that Hardaway & Prowell furnished, were they not?

A. I think so.

F. L. CRITTENDEN.

173 ALEX H. BYRD, a witness produced on behalf of the complainant, being first duly sworn, deposes and says as follows:

Examined by HENRY FITTS, of counsel for complainant:

Q. This is Mr. Alex Byrd, is it not?

A. Yes, sir; Alex H. Byrd.

Q. Mr. Byrd, were you in the employ of the United States Government as assistant to the inspector at Lock No. 4 in the Black Warrior River, in the fall and early winter of 1903?

A. I was employed, Mr. Fitts, as recorder for the Government, not as assistant. Mr. Crittenden was the inspector's assistant.

Q. State what your duties as recorder were, and how you discharged them?

A. My duties were to get a list of the number of men engaged on the work each day and turn that list over to the inspector in charge.

Q. From these reports which you gather each day, were the ten day reports of the Government compiled?

A. According to the best of my knowledge they were. Mr. Long had made out those ten-day reports.

Q. Now state what stationery was supplied to you to get these reports, and how you gathered the information?

A. I can show you better than I can explain about the stationery.

Q. Did you have a form?

A. We did not use a form, we would take a book, a field book, a transitman's book, divided into sections for the number of foremen engaged at the quarry, the number of stone cutters and the number of laborers engaged in the quarry, work upon dam, work upon coffer dam and other things going on about the lock there.

Q. Then you would visit these various departments of the work and find out the number of men engaged in each work and put it in the book daily?

A. Yes, sir.

Q. And this was turned over to the inspector?

A. To the inspector in charge.

Q. And there your work on the ten day reports ended?

A. Yes, sir. I assisted Mr. Long at times in getting this report up.

Q. You did this work with care and truthfulness while you were engaged in it?

Claimant objects to this question upon the ground that it is immaterial and irrelevant, and calls for an opinion of the witness.

174 A. Of course, I carried it on as I always carry on all business. To the best of my knowledge, I think these reports will show that the work was carried on in a thorough manner.

Q. In these reports you reported the labor as you found it, did you?

A. Yes, sir.

Cross-examined by C. B. VERNER, of counsel for claimants:

Q. Mr. Byrd, you couldn't tell anything about what wages were being paid those laborers?

A. No, sir.

Q. You don't know anything about how long this work was carried on do you, the building of Lock No. 4?

A. No, sir. I was just there a short period, a matter of about four or five months, or three or four months, I have forgotten.

Q. Were you there while Mess. Hardaway & Prowell were doing some work up there?

A. Yes, sir.

Q. Did they furnish any stone that went into that dam up there?

A. The stone was furnished by their representative Mr. Mathis.

Q. The man that was in their employ?

A. I don't know who he was employed by, I know he was there as Hardaway & Prowell's foreman.

Q. They put stone in the dam, didn't they?

A. Yes, sir.

Q. Wasn't that all a part of the cost to build that dam?

A. I suppose so.

Q. Couldn't build a dam without that?

A. I don't know, I am not an authority on dam work, they were built according to the blue print. They did it as Mr. Long ordered it. If he didn't think it was right he had it pulled out. If Mr. Long happened not to be there, Mr. Crittenden had it removed if he didn't think it was right, and sometimes I had them removed.

Q. Everything done up there was done according to those blue prints according to the plans and specifications furnished by the Government?

A. It was done by Mr. Long's construction of the blue prints.

Q. Do you know what became of those reports, that you made, Mr. Byrd?

A. My reports were turned over to Mr. Long the inspector in charge.

175 Q. Your reports never went to the Government office at Mobile, I mean the original entries on the book.

A. The book didn't go but there was a report made out by me from this book.

Q. That went on, but the original entries never went, that book never went away?

A. This book that you speak of was just a book similar to a day book and ledger. The work on this book was transferred to a sheet.

Q. And the ten day reports were not made from the original book that you made, but from a transcript from them?

A. Yes, sir; these reports were sent to Mobile by the inspector in charge. There were two copies made, one sent to Mobile and one sent to this office at Tuscaloosa, to Mr. McCalla.

A. H. BYRD,
Euton, Alabama, Greene Co.

The affidavit of William W. Watts marked Exhibit No. 6 is as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

NATIONAL SURETY CO.
vs.
WILLARD & CORNWELL.

The affiant, William W. Watts, says that on the night of the 24th day of October, 1904 he, as solicitor for the National Surety Co. read certain correspondence which had passed between Mess. Helm, Bruce & Helm of Louisville, Ky., and Henry Fitts, of Tuscaloosa, Alabama, in which said Fitts stated the details of the contract between J. E. Willard and C. L. Cornwell on the one part and Joseph Coyne on the other part, and of the contract between Joseph Coyne on the one part and Hardaway & Prowell on the other part which said contracts are filed as a part of the record herein; that affiant as solicitor for the complainant, here, prepared the bill as amended herein as also the various affidavits herein; that affiant made diligent effort to ascertain from William E. Riley and the officers of the Complainant, the facts and details of the transactions between said Hardaway & Prowell and said Coyne but could not learn any details or information from them further than as stated in the affi-
davits of said Riley and William E. Griffin filed in this
176 cause; that the reading of the said correspondency above referred to was the first knowledge that the complainant or anyone for it had of the existence or control of the contracts above mentioned or any contracts other than as it set forth in the affidavits of said Riley.

W. W. WATTS.

Subscribed and sworn to by W. W. Watts before me this 24th day of January, 1906.

A. G. RONALD, *Clerk.*

Filed January 24, 1906.

HENRY F. CASSIN,
Special Manager.

And on April 9, 1906 came the complainant by W. W. Watts its counsel and filed exceptions to the report of the Special Master herein which are as follows:

In the Circuit Court of the United States for the Western District of Kentucky.

NATIONAL SURETY COMPANY, Complainant,
vs.
WILLARD & CORNWELL, ETC., Defendants.

Objections and Exceptions to the Report of the Special Master as Filed Herein upon March 17, 1906.

Comes the National Surety Company, complainants herein by William W. Watts and Henry Fitts, its solicitors, and enters its objections and exceptions to the report of the Special Master filed herein on the 17th day of March, 1906, and as grounds for said objections, would show as follows:

Said report in no wise shows the contention of the complainant nor important evidence relied upon by it in defense of alleged liability for claims aggregating some $46,000. Proof by depositions, stipulations and exhibits was taken and submitted to, filed and read by said Master, but said report in no wise summarizes or makes plain to the court upon what basis or theory about $46000.00 of claims are allowed by said Master as a liability against said complainant.

In this condition of the report counsel for complainant are impressed that exceptions in the usual brief and formal language are not adequate to acquaint the court with the many deficiencies in the report, nor with any real or comprehensive understanding of the facts of the cause as they have been developed, without any material conflict, in a very considerable volume of testimony. This is our apology and justification for the very considerable length and number of the following exceptions:

177 First. The complainant makes a separate, specific and formal objection and exception to each separate claim as allowed by the special master in his report and for grounds of each of such separate objections says that said claim should have been disallowed by the Commissioner.

Complainant without waiving any of said separate objections and exceptions as made to each respective claim, now proceeds to take up the findings and said claims separately and to set forth analytically the facts established by the evidence and the reasons why said claims should have been respectively disallowed.

I.

To the following finding of fact, as set out on page three of said report, to-wit:

"On the 5th day of February, 1901, two of the partners, Willard and Cornwell, entered into a contract with the third partners, Joseph Coyne, by which Coyne agreed to complete the said work in his own name."

And for ground of this exception, says:

1. This finding is so far incomplete as to state but a portion of the matter and facts surrounding said contract, and the part omitted from said finding is highly material to a true presentation of this cause.

2. The said contract provided *inter alia,* the following, which should have appeared from any report attempting to deal with its contents or legal effect, i. e.:

a. That Joseph Coyne was to receive all profits of the contract, and assume all debts of the Willard & Cornwell firm, which thereby retired from the contract, so far as all persons except the United States were concerned; and Coyne was thereby constituted the attorney-in-fact of Willard & Cornwell to collect and endorse all checks issued by the United States in the progress of the work.

b. That all the future purchases for said lock and dam were to be made in the name of Joseph Coyne alone.

c. That said contract to secure a certain indebtedness of Joseph Coyne to Willard & Cornwell gave to Willard & Cornwell a lien on all of the tools, machinery and equipment at the site of the lock and dam.

3. Said finding should have shown that the said contract therein mentioned became a matter of public record as a mortgage in the Probate office in Tuscaloosa County Alabama, the home or place of business of all the claimants on the 8th day of February, 1901.

4. Said finding should have further shown that the contents of this paper became known to the claimant Allen & Jemison Company and to R. P. Prowell of the claimant firm of Hardaway & Prowell at or just about the time of its filing for record as aforesaid;
178 that their claims are wholly for matters arising subsequent thereto.

5. Said finding should have shown, that this contract was expressly referred to and by terms necessary to the proper understanding or construction of a subsequent contract of assignment made between Joseph Coyne and the claimants, Hardaway & Prowell upon June 2nd, 1903.

6. Said findings should have shown that said contract of assignment of June 2, 1903 was relied upon and filed herein by Hardaway & Prowell in support of their claim herein under the terms of which they seek to charge over 7,000 in commissions by which they yet recognize and rely on and authenticate said contract of assignment. They make said contract a part of their claim filed herein and though it is otherwise ignored by the Master, the commissions therein contracted for are allowed by him against the surety not a party to or in anywise cognizant of the execution of said contract.

7. Said finding should have shown that neither the contents of assignment nor existence of said contract of assignment was known to the complainant, or to any of its officers or agents, until a time immediately prior to the filing of the original Bill in this cause and was never assented to by it.

II.

To the following finding of fact as set out at the bottom of page three of said report, viz:

That by a contract of the 2d day of June, 1903, Hardaway & Prowell became sub-contractors.

And for ground of exception, say:

1. That the said Hardaway & Prowell did not, by said contract of June 2, 1903 become sub-contractors of either Joseph Coyne, or of Willard & Cornwell.

2. That the Special Master has completely ignored the contract of assignment from Coyne to Hardaway & Prowell of June 2, 1903, the most important instrument in evidence in the case, and under which alone Hardaway & Prowell do or could claim.

3. The finding should show the contents of said contract of June 2, 1903, substantially as follows:

a. Said contract of June 2d, 1903, makes express reference to the first above mentioned contract of February 5th, 1901, between Coyne and Willard & Cornwell, and is expressly made in respect to the statutes thereby created between Coyne and Willard & Cornwell.

b. Hardaway & Prowell recognized by express recitals therein Coyne's financial inability to carry out the contract, and the existence of $8300.00 in the hands of the United States in retained percentage.

179 *c.* And Hardaway & Prowell agreed to superintend and finance the completion of the work for an agreed compensation of 15 per cent. on the total cost to be taken out of the checks to be issued by the Government for work yet to be done, and out of said retained percentages.

d. Coyne agreed to turn over complete charge of the work, together with tools and machinery to Hardaway & Prowell, and to endorse all Government checks to Hardaway & Prowell, including those for the $8300.00 of previous earned and retained percentages.

e. Provision is therein made for a preferential payment of said 15 per cent. commission out of all money to be received from the Government in the progress of the work and out of said retained $8300.00 already earned by Coyne.

f. The only contingency in which Coyne was to become indebted to Hardaway & Prowell was in the event of its failure to so arrange the Government checks and endorsements thereof as to enable Hardaway & Prowell to collect them. In that event Hardaway & Prowell had the option to annul the contract and collect from Coyne their said 15 per cent. commission and all money advanced by them. Otherwise Coyne was relieved of all further financial hazard in the venture.

3. The said finding should show that Hardaway & Prowell were not sub-contractors of either Coyne, or Willard & Cornwell but were the successors in beneficial interest of said Coyne, who had in his turn been such successor in interest to Willard & Cornwell, all which was known to said Hardaway & Prowell, Allen & Jemison Company and other creditors.

4. That said finding should show that the said contract of June 2, 1903, so far from making Hardaway & Prowell sub-contractors of Willard & Cornwell, shows by its express terms, (1) that they are not even creditors of Willard & Cornwell; (2) that they are not creditors of any person to whom Willard & Cornwell were indebted or were to become indebted on account of any money, material or labor supplied by Hardaway & Prowell.

5. That said finding should show that by said contract of June 2, 1903, Hardaway & Prowell expressly agreed not to look to Willard & Cornwell and *a fortiori* not to their bondsmen, for any labor or money or material supplied—hence the finding that Hardaway & Prowell were sub-contractors is essentially misleading.

6. That said finding is erroneous in that the term "sub-contractor" indicates a liability of the original, or prior contractor, to pay the sub-contractor for the work or material; whereas, the only
180 obligation undertaken by Coyne in said contract of June 2, 1903 was to properly endorse Government checks and there was no contractual obligation of Willard & Cornwell to ultimately pay any one for material or labor supplied by Hardaway & Prowell, but, there was an express recognition of the absence of this obligation by Hardaway & Prowell and said finding should so show.

III.

Complainant excepts to the allowance of $32,750.00 of the claim of Hardaway & Prowell, upon the following grounds, to-wit:

1. Because said report should show that said claim is not for "material and labor supplied" within the purview of the bond, but it is a money claim only; it is for an alleged loss sustained by claimants upon a contract for financiering the completion of the original Government contract in consideration of an agreed percentage to be taken out of the money to be paid by the United States; that Hardaway & Prowell's undertaking was with Joseph Coyne the individual, successor by contract of Willard & Cornwell the firm, the principal, in the bond on which the exceptant was surety to which the surety did not consent and of which it had no knowledge.

2. Because all of the persons comprehended within the terms of said bond as persons supplying material and labor have already been paid in full, or else have not presented claims in this case?

3. Because no person furnishing any of the labor or material for which allowance is made in this finding, to Hardaway & Prowell, have filed claims in this cause, but all of said labor and all persons furnishing material have been paid in full except such material men as have not filed claims in this cause.

4. Because the finding should show that the evidence establishes the following:

(*a*) Said claim is not for labor or material supplied to complainant's principals, or to any of them;

(*b*) That neither said principals in the bond, nor any of them, are or were indebted to claimant's for any of the items of said claim.

(*c*) That under the express and established contract relation be-

tween Hardaway & Prowell and Coyne and Willard & Cornwell, said claimants did not supply said material or labor to complainant's principals, or to any person to whom complainant's principals would, in their turn, have become indebted therefor:

(*d*) That said labor and materials were put into said work by claimants free from all interference by complainant's prin-
181 cipals, and free from all interference by any person whomsoever sustaining a contract relation to complainant's principals, with a view to rescuing retained percentage of $8300.00, and of using the same as profit:

(*e*) And this money, labor and material were put into the work by claimants without looking to complainant's principals, or to any persons sustaining a contract relation to complainant's principals to be paid therefor, further than for the due endorsement of Government checks issued in the progress of such work.

5. Because said finding should show that the claimants Hardaway & Prowell, sustained no contract relation whatsoever to complainant's principals and that claimants in and by a contract entered into with one Joseph Coyne on June 2, 1903, expressly disclaimed and renounced all right to hold complainant's principals responsible for any money, labor or material put by them into said undertaking; that that contract of June 2, 1903 is filed by them in support of their claim herein under which reaffirmation they have claimed and the Master has allowed them over $7000.00 as commissions thereunder.

6. Because the report should show that under the contract arrangement with Joseph Coyne by which claimants Hardaway & Prowell supplied money and superintendence, they could in no event hold complainant's principals Willard & Cornwell responsible for any part thereof; and hence can not recover from this complainant that which they had expressly agreed not to demand from complainant's principals.

7. Because the report should show that claimants Hardaway & Prowell have no right to collect any portion of the sum allowed them in this finding from complainant's principals, nor from any subcontractor of complainant's principals, nor any person sustaining any contract relation whatsoever with complainant's principals.

8. Because the report should show that the original contract was entered into by the United States and Willard & Cornwell upon September 28, 1899; that Willard & Cornwell thereupon entered upon the performance of said contract; that upon February 5, 1901, Willard & Cornwell on the one part and Joseph Coyne on the other contracted that said Joseph Coyne should take over the entire contract and perform the same in such manner as to relieve Willard & Cornwell from all responsibility for labor or material supplied in the work; that Joseph Coyne carried the work forward alone under this contract until the 2d, day of June, 1903; that on that day Joseph
Coyne contracted in writing with claimants Hardaway &
182 Prowell, whereby they in their turn recognized the existing
statutes between Coyne and Willard & Cornwell and contracted on their part to carry forward the work in such manner as

to relieve Joseph Coyne from any liability for labor or material supplied in the progress thereof, so long as he should properly endorse checks issued by the United States in the progress of such work; and that this contractual status *is* established between Willard & Cornwell and Joseph Coyne and Hardaway & Prowell now prevents said Hardaway & Prowell from seeking to collect from complainant that which they had heretofore contracted not to collect from complainant's principals.

9. Because the report should show that claimants, Hardaway & Prowell are the assignees and successors in beneficial interest to said Government contract, and that their relation to said contract, so far as this complainant is concerned, is the same which its principals originally sustained to said contract; that the said contract of assignment or succession is filed herein by said Hardaway & Prowell; that they reaffirm its provisions, basing part of their claims thereon, and seeking payment of commissions of over $7000.00 thereunder; and that the effect of holding this complainant liable for the losses, commissions etc., of said Hardaway & Prowell would be in effect to hold that said surety bond indemnifies any person to whom the principals may assign the contract against all loss on account of the work undertaken in said contract and thus open wide the door to profitable speculation in bonded contracts, wholly at the expense of the sureties.

10. Because the report should show that claimants, Hardaway & Prowell, so far as this complainant is concerned, sustained the same relation to the Government contract which Willard & Cornwell originally sustained; and that this complainant can not now be held liable for losses suffered by said Hardaway & Prowell in the progress of said work.

11. Because the report should show that to allow said claim would be to make a substantial fraud upon complainant, because in February, 1901, Willard & Cornwell had assigned the Government contract to Joseph Coyne with agreement that he should prosecute the same in his own name and relieve them from all further liability on its account; and because Joseph Coyne, under this contract, had for some two years carried this contract forward upon his own individual responsibility, and had in so doing become insolvent and heavily indebted; and because with full knowledge of these facts the claimants did, by assignment on June 2, 1903, take said Govern-
183 ment contract from Joseph Coyne under the same conditions as to liability of Willard & Cornwell as were fixed by said contract of February, 1901, and because the same claimants did then enter upon the work under the said assignment of the contract from Joseph Coyne, without charging this complainant with notice of said substitution.

12. Because the report should show that to allow said claim would be to permit the said claimants Hardaway & Prowell to speculate at complainant's cost and expense, without its consent, in such manner that if successful in their undertaking they should earn fifteen per cent. upon all moneys put, but not risked, in the contract, but if unsuccessful would collect all losses out of complainant, without consent or knowledge of the persons sought to be charged.

13. Because the report should show that claimants Hardaway & Prowell from June 2, 1903, had the whole Government contract, voluntarily assumed by them from Coyne, and are not material men or laborers within the meaning and purpose of the bond which is only intended to protect the actual laborer or the vendor of materials, as such.

14. Because the report should show that the claim of Hardaway & Prowell is only supported by a statement of account which is wholly unintelligible, self-contradictory and from which it is impossible to determine with any degree of certainty the amount actually expended by said claimants in the progress of said work; and the report should further show that the record does disclose with all certainty the amount estimated by the Government engineers as the true value of the material and labor entering into said lock and dam; and that said estimates were carefully made and compiled; and that said estimates show that said claimants have heretofore collected from the United States the full amount thereof; and that said estimates are the only evidence at all trustworthy in this record as to the value of the labor and material put into said work.

15. The report should show that the attempted statement of account in support of this claim is throughout unintelligible and unreliable as indicated by illustrations following:

(*a*) On November 8th, 1904, R. P. Prowell, one of said claimants, was intrusted by order of this court to use a certain $1607.68 in completing said lock and dam and was by said order required to report his disbursements thereof back to the court together with a return of any unexpected balance, in pursuance of this order said Prowell on or about February 27, 1905, reported that he had
184 under said order disbursed in the months of November and December, 1904, and January, 1905, the sum of $2472.96; and claimed on behalf of his firm the balance of $865.28. The statement of Hardaway & Prowell, the correctness of which is deposed by said Prowell under oath, is filed in support of said report. Yet, notwithstanding said Prowell's report so verified, the general claim of Hardaway & Prowell shows disbursements in the same three identical months of $4,883.03, a most material and excessive duplication of the account, not noted in the Special Master's report.

(*b*) A rigid examination of the claimant develops that he has no way whatsoever of establishing the amount expended by his firm in this work except by the sum total of checks drawn on a local bank at Tuscaloosa; with the addition of some $1800.00 which he claims was disbursed without being deposited. The deposition further shows that the witness conducted his business with the bank as bank business is ordinarily conducted by depositing over and over again moneys coming to hand in such manner that the total of checks drawn ceases to be any criterion whatsoever as to the amount of money actually used in this work; for instance, the deposition shows that Prowell drew out of the bank on check money to pay discounts on loans from the bank; that he would then deposit the loan, draw the amount of the loan out by checks and at the maturity of the loan

pay back with a check. Yet though all of this is plainly apparent, though necessarily in diffuse form in the testimony, the fact is wholly disregarded in the conclusions reached by the Special Master and is in no wise summarized for the enlightment of the court. On the contrary, except for some effort to eliminate tools and machinery from this claim, the Special Master had accepted the sum total of withdrawals from the bank as proof of the claim, and has, upon such proof allowed the claim as presented.

(*c*) Although this claim as presented amounts to $31,241.33 which amount plus the amount already gotten from the Government by Hardaway & Prowell, namely, $26,688.00, equals $57,929.39 which latter amount is substantially the equivalent of the sum total of checks drawn on the bank, yet the claim as presented includes fifteen per cent. commissions amounting to $7,556.00 while no single check was ever drawn for such commissions. This establishes the utter fallacy of the claimant's statement of account.

(*d*) Prowell testifies that the total amount of his checks less the $26,688.00 paid to him on Government estimates is the amount he spent and for which he claims reimbursement; yet he further testifies that his firm is yet indebted for $12,000.00 and more.

185–187 No check has ever been drawn for any part of this $12,000.00. Again, the claim as filed included by express statement the $7,556.00 of commissions, for which no checks were drawn, which further accentuates the unreliability of the account. This condition was pointed out to the Special Master in oral argument and brief, and while disclosing a discrepancy of only $19,000.00 finds no place in the report of the Special Master.

IV.

Complainant excepts to that portion of the Special Master's finding which allows the claimants, Hardaway & Prowell compensation of fifteen per cent. upon the money put out by claimants in the prosecution of the work, upon the following grounds:

1. Because said fifteen per cent. is not for labor, within the purview of the bond.

2. Because said percentages are not for labor but for financial backing and financing, which is not a legitimate charge against complainant.

3. Because said percentages are claimed against this complainant because of a substitution of Hardaway & Prowell for the principals in the bond without notice to, or the consent of this complainant; and that, under a contract of assignment, or substitution, filed with and relied upon in the claim of Hardaway & Prowell, and although in this record, before the Master, not noticed in the Master's report.

4. Because the nature of the contract of suretyship entitled the complainant to the character, substance and skill of the principals in the bond, and the complainant can not now charge for these same things when given by a substitute for its principals, such substitutes not being authorized by complainant.

5. Because, although said percentages are claimed for financing the completion of said contract, complainants did not, if the finding

of the Special Master as to the other portions of said claims stands, finance said contract, but simply drew such money as was paid by the Government, and are now seeking to collect everything else out of this complainant.

* * * * * * *

188–213 Respectfully, WILLIAM W. WATTS,
HENRY FITTS,
Sols. for Complainant.

* * * * * * *

214 And on another day of said term of our said court, to-wit, on May 15th, the following proceedings were had:

In the Circuit Court of the United States for the Western District of Kentucky.

NATIONAL SURETY COMPANY, Complainant,
vs.
WILLARD & CORNWELL, ETC., Defendants.

Decree.

This cause came on for hearing and was heard upon the Bill, Amended Bill, Exhibits, Order of Reference, proof in this cause, Report of the Special Master, all exceptions thereto, and the arguments of counsel, and the court having heretofore delivered an opinion in writing, which was filed and made part of the record, and the complainant being now in court by its counsel, and all other parties being likewise in court by their counsel, and pursuant to said written opinion, the court doth now order, adjudge and decree, as follows, to-wit:

First. That the exceptions filed by the complainant to the report of the Special Master, pertaining to the claims of J. M. Wentzell, Assignee of John J. Burke, Strickland Bros. Machine Co., J. Snow Hardware Co., J. E. Baker, A. S. Cleere, Perry & Walter, F. G. Blair, Weatherford Printing Co., Tidewater Coal Co., Harder Planing Mill & Lumber Co., Caroline Portland Cement Co., R. P. Prowell, and Allen-Jemison Co. be and said exceptions are all and each overruled.

Second. That the exceptions to the report of the Special Master, filed by B. H. Hardaway and R. P. Prowell, partners as Hardaway & Prowell, Allen-Jemison Co. and J. Snow Hardware Co. be and all and each of them are hereby overruled.

Third. That each and all of the exceptions to the report of the Special Master, filed by the complainant and pertaining to the claim of B. H. Hardaway and R. P. Prowell, partners as Hardaway & Prowell, be and the same are all and each sustained, and the claim of said B. H. Hardaway and R. P. Prowell, partners as Hardaway & Prowell, being, with interest computed to the first day of March,

1906, for the sum of $32,757.34, is hereby disallowed and dismissed, it being now ordered, adjudged and decreed that the said B. H. Hardaway and R. P. Prowell, partners as Hardaway & Prowell, shall take nothing by or upon their claim against the complainant, National Surety Company.

215 It is further ordered, adjudged and decreed that, except as hereinbefore set forth, the report of the Special Master be and the same is hereby confirmed and approved.

Fourth. That the claims of the following parties, for the amounts set opposite their names, together with interest thereon at the rate of 8 per cent. per annum from June 1st, 1906, unless sooner paid, be and the same are hereby allowed, to-wit:

J. M. Wentzel; Assignee of John J. Burke	$372.33
Strickland Bros. Machine Co.	176.78
J. Snow Hardware Co.	218.64
J. E. Baker	162.55
A. S. Cleere	308.14
Perry & Walter	1047.56
F. G. Blair	59.05
Weatherford Printing Co.	22.54
Tidewater Coal Co.	1073.91
Harder Planing Mill & Lumber Co.	157.00
Carolina Portland Cement Co.	1490.68
R. P. Prowell	2055.72
Allen-Jemison Co.	6146.86

But the aggregate sum of said claims shall be subject to the credit of $8176.75, the fund in court, which fund shall be applied upon said claims in proportion to their respective amounts.

It is further ordered, adjudged and decreed that the complainant, National Surety Company, shall forthwith pay into court the aggregate amount of said claims, (being the sum of $13,261.76, less the aforesaid sum of $8176.75).

It is further ordered, adjudged and decreed that the said complainant shall also forthwith pay into court all the costs of this action, including the sum of $650.00, which is hereby allowed to the Special Master for his compensation in this cause. Execution may issue against the complainant for the amount of the costs herein awarded against it, and also for the amount, with interest, which it is ordered to pay into court, subject to the credit aforesaid.

It is further ordered, adjudged and decreed that leave be and the same is hereby given the following parties to withdraw from the fund in court the sums set opposite their names, to-wit:

A. G. Ronald, on account of his costs	$52.35
Henry F. Cassin, Special Master, in full of his allowance	650.00

This action is expressly reserved for the making of all proper orders distributing to the parties entitled thereto the funds

216 paid into court and to be paid into court in the cause.

Then come said B. H. Hardaway and R. P. Prowell, part-

ners, by counsel and filed their petition for an appeal and assignment of errors.

It is ordered that said appeal be allowed upon the execution of a bond in the penalty of $500.00 conditioned according to law. Thereupon came said parties and tendered to the court said bond, which is now approved and filed.

May 15, 1906.

The opinion above referred to is as follows:

United States Circuit Court, Western District of Kentucky.

NATIONAL SURETY COMPANY
vs.
JAMES E. WILLARD and Others.

Opinion.

The complainant, by its bill filed October 24th, 1904, shows that the United States, had, on October 5th, 1899, accepted the bid of the firm of Willard & Cornwell, composed of James E. Willard, Charles L. Cornwell and Joseph Coyne, for the construction of Lock and Dam No. 4, Black Warrior River, in the state of Alabama; that the construction thereof required a large amount of material and labor, and that under the requirements of the Act of Congress (2 Compiled Statutes 2523) the said firm was required to give and did give a bond in the penal sum of $50,000 for the faithful performance of their contract and for prompt payment to all persons supplying said firm with labor and material in the prosecution of the work under the contract. We need not notice the elaborate contract between the United States and the firm covering the details of the work, but the provisions of the bond as distinguished from the contract are most important, and are as follows:

Contractor's Bond (Public Works).

Know all men by these presents, That we, James E. Willard, Charles L. Cornwell, and Joseph Coyne, partners composing the firm of Willard & Cornwell, of Louisville, Kentucky, as principals, and National Surety Company, of New York City, a corporation existing under the laws of the State of New York, as surety, are held and bound unto the United States of America in the penal sum of fifty thousand ($50,000.00) dollars, to the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

217 The condition of this obligation is such, That whereas the above-bounden Willard & Cornwell have, on the twenty-eighth day of September, 1899, entered into a contract with the United States, represented by Major Wm. T. Russell, Corps of Engi-

neers, U. S. Army, for construction of lock and dam No. 4, Black Warrior River, Ala.

Now, therefore, if the above-bounden Willard & Cornwell, heirs, executors, or administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Willard & Cornwell to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying them labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.

The firm commenced, and for a year or more continued the work, but ultimately, in February, 1901, abandoned it (so far as two of its members could) to the other member, viz., Joseph Coyne, under the following contract, viz:

This agreement, made and entered into by and between J. E. Willard, and C. L. Cornwell, parties of the first part, and Joseph Coyne, party of the second part.

Witnesses, whereas, the said parties under the firm name of Willard & Cornwell have now and have heretofore had a contract with the government of the United States for the building and construction of Lock and Dam No. 4 on the Black Warrior River in the county of Tuscaloosa in the state of Alabama, and, whereas, the said firm of Willard & Cornwell, as composed of the said J. E. Willard and C. L. Cornwell and Joseph Coyne, is a firm and co-partnership formed only for the purpose of building and constructing the lock and dam aforesaid, and for no other purpose, and whereas, for the benefit of the government, and for the convenience of the said parties and of all persons now, or hereafter to become interested in said work, it is deemed advisable and beneficial that the said Joseph Coyne shall pay all the debts now due by said firm, and have and receive all the profits heretofore accruing or hereafter to accrue on said work, and whereas, the said Coyne has purchased from the said firm the plant, tools, and machinery herein mentioned, and desires to protect himself as well as the government of the United States
218 in all and every way possible to him and to the said firm, and whereas, the said Coyne is the owner, as among said parties, of all the tools, machinery and plant now in said county of Tuscaloosa, and used or to be used in and about said work, which were put into said firm by the said Willard and the said Cornwell, and whereas, the said Coyne desires to pay to the said Willard and to the said Cornwell together the sum of forty-four hundred dollars ($4,400.00), and, whereas, as between said co-partners and the government and others, they, the said Willard and the said Cornwell have fully empowered and constituted the said Joseph Coyne, as agent, and attorney in fact of said firm to receive all moneys now due, or hereafter to become due to said firm by reason of, or in any manner arising from said contract with the government, as aforesaid, and it is agreed between the parties that the said Coyne shall execute and

deliver to said J. E. Willard and C. L. Cornwell his two promissory notes of even date, herewith, each for the sum of twenty-two hundred dollars ($2200.00) and payable respectively in six and nine months after date, and that to secure the payment of said notes by said Coyne to said J. E. Willard and C. L. Cornwell, they, the persons last mentioned shall have a lien upon said plant, tools and machinery now used in and about said work and by them heretofore put into the firm assets, and that upon the payment by said Coyne of said notes, all interest of said Willard and of said Cornwell in said tools, plant, and machinery, shall cease. It is further agreed that all future purchases for said Lock and Dam No. 4 are to be made in the name of Joseph Coyne alone, and that he is to pay the debts of said firm as aforementioned.

Witness our hands at Louisville, Ky., this fifth day of February, 1901.

J. E. WILLARD,
C. *R.* CORNWELL.
JOSEPH COYNE.

STATE OF ALABAMA, *Tuscaloosa County:*

I, Jas. C. Brown, Judge of Probate, hereby certify that the foregoing conveyance was filed in my office for registration on the 8th day of February, 1901, and duly recorded in Contract Record No. 1, pages 471 and 472.

JAS. C. BROWN,
Judge of Probate.

Coyne continued the work for a time, but getting into difficulties in June, 1903, made a contract with Hardaway & Prowell, as follows:

STATE OF ALABAMA, *Tuscaloosa County:*

This contract made this the 2nd day of June, 1903, by
219 and between B. H. Hardaway and R. P. Prowell, hereinafter called Hardaway & Prowell, as parties of the first part, and Joseph Coyne, as party of the second part, witnesseth:

That, whereas, Willard & Cornwell, a firm composed of J. E. Willard, C. *R.* Cornwell and the said Joseph Coyne, did, heretofore, on to-wit, the — day of —, 1899, enter into a contract with the United States for the construction of Lock No. 4 in the Black Warrior River above Tuscaloosa, Alabama, and whereas, shortly after the beginning of the work upon said lock the said Joseph Coyne, by an arrangement between him and his co-partners, undertook to complete and finish said lock according to the specifications of the contract of said firm with the United States, and in consideration of such an undertaking acquired the beneficial interest of said firm in said contract and was to receive all amounts paid by the United States in consideration of such contract, and, whereas, said lock is still uncompleted, and the said Joseph Coyne can not, on account of his inability to procure the necessary financial aid and on account of the disor-

ganization of his labor forces and for various and sundry other reasons, complete and finish the said work in accordance with the said contract, and whereas said contract is a valued asset to the said Joseph Coyne if the said work can be prosecuted to its completion under the terms of said contract, there being held in reserve by the government under the terms of said contract about $8300.00, which has already been earned by said Coyne, and whereas by reason of his said inability to finish said work the said contract is about to be forfeited, and the said Coyne is in imminent danger of losing, not only what profits may be made upon the completion of the work, but the entire reserve fund also retained by the government, and whereas the said Joseph Coyne for the purpose of preventing the forfeiture of said contract, has made overtures to the said Hardaway & Prowell to take up said work and complete it, and the said Hardaway & Prowell have agreed to do so upon the terms and stipulations hereinafter set forth; now, therefore,

1. The said Hardaway & Prowell do hereby undertake and agree with the said Joseph Coyne to superintend the completion of the said lock and dam No. 4 and to furnish the necessary finances for the completion thereof and to put in charge of said work a competent superintendent and to properly organize the work for an energetic prosecution thereof to completion for which services they are to receive an agreed compensation of 15 per cent. upon the total cost of completing said contract, which total cost shall be construed to include all amounts necessarily expended and expenses incurred by Hardaway & Prowell in the completion of said work and all amounts necessarily paid and expenses incurred by them to effect a settlement with and an acceptance of said lock and dam by the United States.

2. The said Joseph Coyne agrees to the above compensation for Hardaway & Prowell and further agrees to turn over to them entire charge of the completion of said work, and not to interfere with them in any way in the prosecution of said work to completion, and further agrees to turn over to the said Hardaway & Prowell the entire outfit of machinery, tools, etc., which he now has at said lock and dam and the quarries where he is getting stone, and to give the use of the same to them for the completion of said work free of any charge.

3. The said Joseph Coyne further agrees to have all checks for each estimate upon said work forwarded by the government to the said Hardaway & Prowell and to properly endorse such checks so that they may be collected by Hardaway & Prowell.

4. It is further agreed by all parties hereto that out of the proceeds of the checks referred to in the next foregoing paragraph the obligations shall be paid preferentially in the following order:

1. The compensation of the said Hardaway & Prowell as herein agreed for their services.

2. All moneys advanced by Hardaway & Prowell and used in the prosecution of said work.

3. All debts necessarily incurred by the said Hardaway & Prowell

for the prosecution of said work other than debts for labor and material.

4. All debts incurred by said Hardaway & Prowell for labor and material or moneys advanced by them in payment of labor or material debts.

5. The said Joseph Coyne, for the completion of said work and for the securing to the said Hardaway & Prowell all amounts, that they shall have to pay on whatever account for the completion of said lock and dam and for a settlement with the United States and acceptance of said lock and dam by the proper authorities of the government, does hereby assign and set over to the said Hardaway & Prowell all his interest in the amount, aggregating as aforesaid about $8300.00, retained and now held in reserve by the government under the said contract for the building of said lock and dam, which shall be applied by the said Hardaway & Prowell in the following order:

1. To the payment of all debts for labor and material in-
221 curred in the building of said lock and dam.

2. Any balance that may be due to said Hardaway & Prowell for their compensation under this contract.

3. All other necessary debts incurred in the prosecution of the said work by Hardaway & Prowell and all amounts including expenses which they shall have to pay in order to affect a settlement with the government and acceptance by it of said lock and dam.

4. Any balance to be paid to the said Joseph Coyne.

6. It is understood and agreed by all parties hereto that if the said Joseph Coyne should at any time fail or be unable to turn over to the said Hardaway & Prowell the checks for estimates on said work properly endorsed so that Hardaway & Prowell can collect them or should fail to secure the collection of them by the said Hardaway & Prowell then the said Hardaway & Prowell shall in that event have the option of annulling said contract and stopping work without notice to the said Joseph Coyne, or to any other parties whomsoever, but in said event the said Hardaway & Prowell shall have a claim against the said Joseph Coyne for all moneys furnished by them and expenses incurred by them upon any account whatsoever in the prosecution of said work, and which shall not have been repaid to them, and for all compensation earned under this contract and not paid to them, and such claim shall be due and payable at once upon their termination of the contract.

In witness whereof the said parties of the first and second parts have hereunder set their hands and seals in duplicate, this the day and year first above written.

B. H. HARDAWAY.
R. P. PROWELL.
JOSEPH COYNE.

Attest: C. B. VERNER.

The bill charges that although each and all of the defendants agreed in their application to complainant to become their surety on the bond, to bestow upon the work their personal attention and

supervision, they each and all failed to do so. These allegations, however, do not seem to be material to any question now involved.

On November 8th, 1904, an order was made by agreement of parties directing the payment to R. P. Prowell of $1607.68, then described as the amount of the then last estimate made by the United States on the work, and he was directed or permitted to use the amount or so much of it as was necessary for the completion of the lock and dam, and to pay any surplus into court. On March 15th, 1905, he reported that he had not only paid out all of the
222 $1607.68, but in addition had expended a further sum of $865.28—a total of $2,472.96. I find no order authorizing the expenditure of the excess, but most probably the excess expenditure had reference to the contract last above copied.

The bill in this case was filed after the situation in October, 1904, had been discovered by the complainant, and under the operation of the orders made herein a further balance due on the work by the United States amounting to $8176.75 was on May 31, 1905, paid into court, where it now remains. The United States has no further concern with the case, and all questions involved are those which grew out of claims for labor and materials supplied either to Willard & Cornwell or to Joseph Coyne or by or to Hardaway & Prowell.

Without any formal pleadings by any of those who claim to have supplied labor and materials, the court, pursuant to the request and stipulation of the parties, entered an agreed order on November 8th, 1904, referring the case to the Special Master to audit the claims, etc. When this order was entered no idea was conveyed of the various and somewhat intricate questions that might come up when the claims were presented, and when the last two contracts above copied should be filed. Hence, it was not anticipated that a state of case would arise which would call for the laying down of exact rules for the guidance of the Special Master. Indeed, the court was in no way advised of the status until called upon to hear argument on the pending exceptions to the Special Master's report. The investigation of certain important legal questions which might more appropriately have been made at the reference was for that reason delayed until the present. As already intimated, some parts of the claims for labor and materials supplied, which were filed before the Special Master, arose before the contract of February 5th, 1901, between James E. Willard and Charles L. Cornwell on the one side and Joseph Coyne on the other; some parts of them arose between that date and the 2nd day of June, 1903, when the contract was made between Joseph Coyne on the one side and Hardaway & Prowell on the other, and still more of them arose after the making of that contract. Each of these three sets of claims demand separate treatment.

Class 1.

It appears that only part of one of the claims was created before February 5th, 1901, namely, part of the claim of the Tidewater Coal

Co. This claimant had supplied to the original firm material
223 used in the prosecution of the work to the extent of $361.85, which had not been paid, and that sum with interest is reported to be $516.23.

I can not agree that any part of the claim of Allen-Jamison Co. comes into this class. While several thousand dollars of this claim were for supplies purchased before February 5th, 1901, the proper application of the payments made before June 2, 1903, extinguished that part of the indebtedness. This, however, is not very material.

Class 2.

The balance of the claim just mentioned, namely, $557.68 thereof, is for materials and labor claimed to have been supplied after February 5, 1901, and interest thereon. In addition to these two, eleven other persons, corporations and firms claim to have supplied labor and materials or to be the assignees of those who did, and these materials and all the labor are asserted to have been used in the prosecution of the work on the lock and dam between February 5, 1901, and June 2, 1903.

Class 3.

Only one claim of this class was presented to the Special Master, to-wit, that of Hardaway & Prowell, and this claim to the extent of $32,757.54 was allowed by him.

In the main the Special Master allowed most of the claims presented of the second class, though he reduced some of them on account of items not properly to be regarded as labor or materials, and many exceptions have been filed directed to this part of his report. The complainant has also filed many exceptions which have relation to the claim of Hardaway & Prowell and the latter have excepted to the action of the Special Master in disallowing some items of their claims.

1. It is conceded upon all hands that $516.23 of the claim of the Tidewater Coal Co., which covers items for labor and materials supplied to the firm of Willard & Cornwell previous to February 5, 1901, is a just and proper claim against the fund in court if not against the complainant. The court is of the opinion that that part of that claim is a proper charge, both against the fund and against the complainant as well.

2. But it is most earnestly insisted that the complainant is not personally liable for any part of the claims of class 2. It is pointed out that all of these claims were created with the full knowledge upon the part of the respective claimants that Joseph Coyne alone was conducting the work on the lock and dam after February 5, 1901, and that all of the accounts representing those claims were for that reason charged to Coyne alone, and none of them
224 were charged to Willard & Cornwell. It is also pointed out that the bond given to the United States, and upon which alone this class of claimants can rely in this proceeding, after bind-

ing the obligors therein to certain stipulations respecting the contract with the United States, also stipulates that said obligors including the complainant "shall promptly make full payments to all persons supplying them labor or materials in the prosecution of the work provided for in said contract." The complainant contends that it is a mere surety and is bound precisely as it contracted and no further; that the stipulation just copied binds it to promptly pay all claims for labor and materials supplied to Willard & Cornwell as a firm, and that that firm is alone included in the pronoun "them" as used in the provision just copied; that it necessarily increased and certainly changed the risk and liability of the surety for the complainant to furnish the supplies to and upon the credit of one person instead of the credit and ability to pay of three persons, and that as all of the claimants of Class 2 knew of the contract of February 5, 1901, and supplied labor and materials to Joseph Coyne alone and not to "them"—(that is to say, not to the firm of Willard & Cornwell), the complainant upon general principals of law is not bound for any of this class of claims. There are, indeed, certain general principles of law relating to Principal and Surety which have been long established. Among them are, first, that the surety's contract is to be strictly construed; second, that any change in the contract without the consent of the surety releases him, and, third, that any increase of his risk without his consent also releases him. These principles are strongly pressed as bearing upon claims in Classes 2 and 3. Here the contract between the United States on the one side and Willard & Cornwell and the surety company on the other, was not itself changed by the parties to it, but with the knowledge of the claimants who credited Joseph Coyne alone, the partners composing the firm of Willard & Cornwell, as between themselves, changed their relations and contract, and as far as they could do so, transferred their rights and liabilities to one only of the partners. Evidently this change was without the knowledge or consent of a not very vigilant surety, but upon all the grounds indicated, and perhaps others, it is strenuously insisted that the surety was released, and it might be hard to resist this conclusion but for one authority. In the very recent case of the United States, *et al. vs.* American Surety Co., decided January 2, 1906, the Supreme Court had occasion to look into the object of the legislation to
225 which we have referred, and the purpose and scope of the penal bond required thereunder, and as labor and materials were supplied by this class of claimants to Joseph Coyne, who was a member of the firm of Willard & Cornwell, the original and principal contractors, and as that labor and those materials under Coyne's express orders and supervision actually went into the work done under the contract with the United States, I have concluded that the stress of the opinion in that case requires me to hold that the labor and materials supplied to Coyne and used by him in the work done under the contract come within the obligation of the complainant. I do this with some hesitation because no question growing out of the change of the contract relation of the principal obligors was pre-

sented in the case referred to, and the condition now confronting us might not have been within the view of the Supreme Court when it remarked that it did not see how the surety in that case could be injured by what had actually occurred. There had been a sub-contractor in that case and not a dissolution of a partnership. A sub-contractor is a very familiar character. One contracts to build a house and then sub-contracts with A for the foundation, with B for the brick work, with C for the plumbing, with D for the carpentering, etc. But here I think there is no such simple thing as that, but something more and something entirely different.

I, therefore, put my judgment upon this class of claims upon the ground that Coyne was a principal in the bond, and that labor and materials were supplied to him as such, and not upon the ground that he was a sub-contractor within the purview of the opinion in United States *vs.* American Surety Co. This general proposition being settled, we are brought to inquire as to the exact amounts due each of this class of claimants. In this connection at least there can be no latitudinous construction of the contract of the surety. It is entitled here to a strict adjudication of its rights. It contracted for the prompt payment of all just claims for labor and materials supplied to "them" (meaning Willard & Cornwell), and used in the prosecution of the work provided for in the contract with the United States. Nothing but labor and materials in the proper sense of those terms which were used in the prosecution of the work "provided for in the contract" with the United States can be taken into account in passing upon these claims. Courts have probably been more or less astute to find the exact principles governing such cases, but I may say once for all that I do not think that labor and materials used in the construction of houses for laboring men and kindred ob-
226 jects come within the liability of the surety, because I do not find that any of these things were provided for in the contract with the United States, filed in the record, and hence persons who supplied labor and materials for these outside objects are not protected and were never intended to be protected by the penal bond exacted by the government under the statute, which bond only stipulated for the prompt payment of claims for labor and materials supplied for the work the United States had contracted for when the bond was exacted. For other claims, even if closely connected with the interest of the contractors, their creditors must look to them alone. The obligation of the surety is one of strict law.

In the main the original exceptions filed April 9, 1906, by the complainant to the allowance of the claims in Class 2 are based upon the general ground that it is not bound for any of them because of the contract of February 5, 1901. But all exceptions based upon that contention must be overruled upon the grounds we have heretofore indicated.

Additional exceptions were filed by the complainant on April 17th, 1906, and while they, including the so-called exhibits referred to therein and also including a reference back to the original exceptions, are rather too vague, or at least in some particulars, to demand

the court's attention, we have nevertheless gone into them all with some care, and will in detail take up each of the claims of Class 2.

J. M. Wentzell, Assignee.

The Special Master allowed this claim, including interest, and the exceptions thereto are either upon the general ground that the surety is not bound therefor because the labor and materials were supplied to Coyne alone, or else the exceptions are too vague to require further notice. All exceptions to the allowance of this claim are overruled.

Strickland Bros. Machine Co.

The exception to the allowance of this claim is that the whole account is for repairs on machinery, but I think the evidence and the stipulation in regard to it sustains the action of the Special Master, and all exceptions thereto are overruled.

J. Snow Hardware Co.

I think the evidence sustains the action of the commissioner on this claim, and the surety's exceptions to its allowance are all overruled. The claimant's own exceptions to the report of the Special Master on account of his refusal to allow certain items of the account filed are likewise overruled.

227

J. E. Baker.

This claim appears to be sustained by the evidence, and complainant's exceptions thereto are overruled.

F. G. Blair.

The same may be said of this claim, and the exceptions to its allowance are overruled.

Weatherford Printing Co.

This claim is too insignificant to consume time for much inquiry as to whether the Special Master was right or wrong in allowing it. We shall presume that he was right, and overrule the exceptions filed to this part of the report.

Tidewater Coal Co.

The allowance of this claim was clearly right, both as to the part which we have placed in Class 1 and as to the part which we have placed in Class 2. The exceptions to it are therefore overruled.

Harder Planing Mill and Lumber Co.

The stipulation as to this claim shows it to be a proper one unless I am wrong in the general view I have taken as to its being within

the terms of the penal bond. All exceptions to its allowance are consequently overruled.

Carolina Portland Cement Co.

If I am correct in the general views I have expressed the exceptions to this claim must be and they are overruled. For reasons which have been stated I think it clearly comes within the penal bond.

R. P. Prowell.

The original exceptions to the allowance of this claim are too vague to require further notice, even when we include the so-called exhibit. The amended exceptions fall within the general views expressed as to the liability of the surety for labor and materials supplied to Coyne, and all exceptions to the allowance of this claim are overruled.

Allen-Jamison Co.

The exceptions of the complainant to the allowance of this claim are overruled upon two grounds, namely, first, that it makes no difference that the labor and materials referred to therein were supplied to Joseph Coyne, and second, because I do not think the finding of the Special Master thereon was flagrantly against the evidence, if indeed it was against the evidence at all.

The exceptions filed by this claimant itself to the action of the Special Master in disallowing some items of the account filed by it must also be overruled. I think the items disallowed are not such as the surety in the penal bond undertook to pay.

Perry & Walter.

228 This claim is based upon time checks which divers laborers on the works previous to June 2, 1903, assigned to the claimants. I am inclined to hold and do hold that these claimants may fairly stand in the place of the laborers who assigned the checks. But for the liberty of doing this the laborers would have been subjected to even greater hardship than being compelled to submit to a discount. I think that that discount in no way inured to the benefit of the surety nor discharged its liabilities for the laborers' claims. As these claims appear to have been for labor supplied to Coyne the exceptions to the allowance of this claim are overruled.

A. S. Cleere.

The Special Master finds that such parts of this claim as were allowed were based upon time-checks "given to laborers for labor performed by them for Joseph Coyne upon said work." While the accuracy of this particular finding might possibly have been doubted upon the evidence and exhibits found in the record, no exception based upon that ground has been filed, and we assume the finding to be correct. Indeed the exceptions themselves assume the finding to be correct, and are based, 1st, upon the ground that there was

some arrangement with Coyne about a discount, and 2d, that the discounting was for his benefit. I see no ground for these assertions, and for the reasons indicated in what has been said relative to the claim of Perry & Walter these exceptions are also overruled.

Some exceptions are made to the allowance of interest, but as the penal bond binds the principal obligor and their surety to pay promptly and in full all claims for labor and materials supplied, I do not see if that was done, why interest should not be allowed. There is no exception upon the ground that the legal rate of interest in Alabama as applicable to such cases is not 8 per cent. per annum. Consequently all exceptions to the action of the Special Master in allowing interest upon the various claims of this class and of class 1 will be overruled.

It seems to me, therefore, that the claim in Class 1, to-wit, that of the Tidewater Coal Co., for $516.23, and the following claims in Class 2, to-wit, J. M. Wentzell, assignee, for $372.33; Strickland Bros. Machine Co., $176.78; Snow Hardware Co., $218.64; J. E. Baker, $162.55; F. G. Blair, $59.05; Weatherford Printing Co., $22.54; Tidewater Coal Co., (in addition), $557.68; Harder Planing Mill and Lumber Co., $157; Carolina Portland Cement Co., $1490.68; R. P. Prowell, $2025.72; Allen-Jamison Co., $6146.86; Perry & Walter, $1047.56; A. S. Cleere, $308.14; and all of which amount in the aggregate to $13,261.76, were properly allowed by the Special Master.

229

Hardaway & Prowell's Claim.

3. We come now to the claim of these parties, the only one in Class 3. The general facts will be recalled that with the labor and materials supplied by these claimants neither one of the original contractors had anything to do. True the United States made no objection, if indeed it had any knowledge of the transfer by Coyne to these claimants of the contract of June 2, 1903, and the Surety Company knew nothing of it until rather late in 1904. That contract, we think, went far beyond anything which we are accustomed to regard as meeting the idea of a sub-contractor. The penal bond we may again recall bound the surety to make prompt payment to all persons supplying labor or materials to the firm of Willard & Cornwell in the prosecution of the work provided for in the contract with the United States. We have construed this clause to mean any one of the firm of Willard & Cornwell, but it does not by any fair construction of the language used bind the surety to pay anything to anyone else for supplies furnished to themselves by themselves. This particular claim, if the anomaly is possible, is one due to Hardaway & Prowell from themselves. If anyone contracted with respect to the items thereof it was those parties with themselves, and we think it certainly does not come within the stipulation of the bond. The materials and the labor thus supplied, even if used upon the work, were not in any fair sense supplied to Willard & Cornwell, or to either member of that firm, but were altogether supplied to entirely outside parties by those outside parties themselves. To the certain knowledge of Hardaway & Prowell every remnant of control over

the matter had been thrown off by every member of the firm of Willard & Cornwell.

The contract of June 2, 1903, *per se*, conveyed to Hardaway & Prowell full information that all of the members of the firm of Willard & Cornwell, including Joseph Coyne, had successively abdicated their duties under their contract with the United States, and had turned them over to these claimants. At this point, if Hardaway & Prowell did not know of the existence of the penal bond of course they did not contract with any reliance upon it. On the contrary, if they did know of the bond, good faith and every applicable equitable consideration demanded that full notice of the proposed change in the situation should be given the surety—a party most vitally and obviously interested—to the end that it might have the opportunity to agree or to object to this most important change and take steps to protect itself. Failing to do this, the claimants put themselves in an attitude wholly inconsistent with a just right to
230 claim against the surety, who had been ignored and disregarded at the outset. However, the rights of the surety in this case do not depend upon Hardaway & Prowell's knowledge or their lack of knowledge of the penal bond, and whether they in fact knew of it or not, the surety, before it could be bound, was entitled to know of the new contract, and to have an opportunity to accept or reject the new arrangement, if it was thereby intended that the surety should come under any obligations respecting that new contract. This right of the surety necessarily resulted from the radically changed situation and the new contract on its face and ultimately under its practical workings showed how immensely and recklessly was increased the cost of the work and the risk of the surety. It can not be that a right to make a new contract existed whereby the most licentious expenditures could be made and a commission thereon charged to the surety without giving it any opportunity or chance to participate in the making of such an agreement. In short, the surety was not a party to this contract.

Without going at much length into authorities upon general principles of law, which in the main are elementary, we may observe that in United States *vs.* Freel, 186 U. S. 309 it was held that the obligation of a surety does not extend beyond the terms of his undertaking, and when this undertaking is to secure the performance of an existing contract, if any change is made in the requirements of such contracts in matters of substance without his consent, his liability is extinguished. While in that case the contract was changed by the principal parties to it, it can not fail to be noticed that in the case before us there was in fact a change of the most substantial character from the situation contemplated by the parties when the penal bond was executed.

In the opening sentence in its opinion in United States *vs.* Allsbury 4 Wallace (71 U. S.), 186, the Supreme Court said, "It is unnecessary to refer to authorities to show that the liability of the surety can not exceed that of his principal." In the case before us no member of the firm of Willard and Cornwell is in any wise bound to Hardaway & Prowell for any part of the demand claimed, and yet

it is sought to hold the surety on the penal bond for this claim, although the principals on that bond are manifestly not bound for it, and who, if ever bound, were released by the contract itself. Not only is the principal in the bond released from liability for this claim, if any liability ever existed under the contract of June 2, 1903,
but the contention here would extend the liability of the
231 surety entirely beyond any possible liability of his principal,
thus in effect making the surety the principal and the only debtor to Hardaway & Prowell.

Upon these grounds it will require a more licentious construction of the penal bond executed in this case than I am willing to give to it to hold an outside party liable for the debt these claimants owe themselves for the labor and material supplied to themselves in a venture in which they embarked with the expectation of making a profit for themselves and for that purpose alone. It seems to me clear that the surety in the penal bond never agreed that that profit, if any, should be made out of it, nor that any loss would be paid by it, and while in an appropriate case we might fairly construe the bond to include a sub-contractor in the proper sense of that term as having been originally within the contemplation of the parties, we can not imagine that such an arrangement as that made between the parties to the contract of June 2, 1903, was within the contemplation of the surety when it signed the penal bond. It may be proper to say that probably no court has more often reminded the Bar that general possessions in an opinion of the court must be limited to the case in hand than has the Supreme Court of the United States, and I see nothing in the facts in the case of the United States *vs.* American Surety Co. which seems to me fairly to control this phase of this case. But I do note in the opinion in that case a suggestion that upon the facts there shown the court could not see how the surety on the bond could be injured. That remark certainly could not be applied to this case, for if this surety was ever thought of before the ultimate losses developed (which may well be doubted), there was the most reckless disregard of its interests and rights in the premises, and all, too, without the slightest notice to the surety of what was going on. This general fact shines through the contract of June 2, 1903. It shows through the obviously extravagant expenditures of the claimants and probably in other ways apparent upon the record. We hold, therefore, 1st, that this claim does not come within the penal bond at all; 2nd, that the contract and what was done under it greatly changed and increased the actual risk of the surety if in any other view of the case it was bound for what these claimants did after June 2, 1903; 3d, the principals in the penal bond were never bound for this claim, and 4th, the claim is not, in many respects, satisfactorily proved; but even if some or all of the labor and materials claimed to have been supplied were put into the Lock and Dam, they were not supplied to the
firm of Willard & Cornwell, nor to any member of that firm,
232 for that purpose, as provided for in the penal bond, but were
supplied to Hardaway & Prowell by themselves under their

contract of June 2, 1903—a very different proposition. To enforce the latter against the complainant as though it were a party thereto or had notice thereof would be to place the complainant at the mercy of parties it had never heard of under a contract it had never seen, as to prices and quantity of labor and materials and without the curb that would always have been present in the sense that claimants' own interests and their profits depended upon economy and good management and not even in part upon large expeditures upon which a commission was to be paid. Indeed, there were at least four concurrent conditions upon which the liability of the surety of the penal bond was made to depend by the agreement of the parties. They were, 1st, that the labor and materials should be supplied; 2d, that they should be supplied to Willard & Cornwell, 3d, that the labor and materials so supplied should be used in the work on the Lock and Dam, and 4th, that payment therefor had not been made by Willard & Corn-ell. All these must concur. If either was wanting the surety did not agree to be bound. It is entirely clear that one of the express and most material conditions is absent, to-wit: the second one just named, and we are not at liberty to supply it. And it may be repeated that this increase of the surety's risk was clearly outside of any reasonable contemplation of the parties to the penal bond.

I might write more in detail, but this general statement will indicate the grounds upon which I will sustain all of the claimants' exceptions to the claim of Hardaway & Prowell. And the same disposition may be made of their own exceptions to the ruling of the Special Master upon their claim.

The Fund in Court.

This fund, as before indicated, is $8176.75. It is made up of certain percentages withheld by the Government from time to time out of what would otherwise have been due under the contract. It appears from the record that the whole sum was reserved upon the estimates for work done previous to June 2, 1903, and consequently the surety is entitled to the full benefit of this fund, though Hardaway & Prowell, in my judgment, would have been entitled to any reservation in respect to the work done after June 2, 1903. Section 3468, Revised Statutes of the United States, respecting the rights of sureties may also support this conclusion of the court, even if the facts in the record do not otherwise make it clear.

233 *Conclusion.*

It results that the complainant is liable for $13,261.76 on the claims of Classes 1 and 2. This sum includes of course the $8,176.75 the fund in court. The difference, namely, $5,085.01, and the costs of this action, should be paid into the court by it.

Costs.

The agreed order of November 8, 1904, seems to take care of all questions of costs, but if not, they may be provided for when the judgment is prepared.

An allowance to the Special Master for his services should be made, and it should include whatever may be proper to cover expenditures for stenographic work.

Counsel may prepare and present a judgment.

May 5, 1906.

WALTER EVANS, *Judge.*

In the Circuit Court of the United States for the Western District of Kentucky.

NATIONAL SURETY COMPANY, Complainant,
vs.
JAMES E. WILLARD, ETC., WILLARD & CORNWELL, Defendants.

Petition for Appeal and Assignment of Errors.

B. H. Hardaway and R. P. Prowell, partners under the name and style of Hardaway & Prowell, conceiving themselves aggrieved by the decree made and entered on the 15th day of May, 1906, in the above entitled cause, do hereby appeal from the said decree to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed and granted, and that a transcript of the record, proceedings and papers in the cause duly authenticated may be sent to the United States Circuit Court of Appeals for the Sixth Circuit; and they pray that said decree may be reversed, annulled and held for naught, and for such other relief as may be proper in the premises.

And petitioners, B. H. Hardaway and R. P. Prowell do assign errors as follows:

1. That the Court erred in disallowing and dismissing the claim of these petitioners for the sum of $32,757.34, and in adjudging that these petitioners shall take nothing by or upon their said claim against the complainant, National Surety Company; said claim being for the value of labor and materials, with interest thereon, furnished by petitioners to Joseph Coyne and to James E. Willard and C. L. Cornwell, and used by them in the construction of
234 lock and dam No. 4 in the Black Warrior River in the State of Alabama, in pursuance of a contract made by them with the United States, upon which contract the complainant became surety. These petitioners claim that the Court should have decreed, ordered and adjudged that the complainant should pay, and these petitioners should recover of the complainant, the amount of its claim, $32,757.34, with interest thereon at the rate of 8 per cent. per annum from March 1, 1906, until paid.

2. That the Court erred in overruling the second exception filed to the report of the Special Master by these petitioners; whereas the Court should have ordered adjudged and decreed that these petitioners should recover of the complainant 15 per cent. on the sum of $4,676.15, with interest thereon at the rate of 8 per cent. per annum from February 1, 1905—said sum of $4,676.15 being for labor and materials furnished to the contractors afor-said and used in the prosecution of the work upon said lock and dam.

3. That the Court erred in overruling the third exception filed to the report of the Special Master by these petitioners; whereas said Court should have ordered, adjudged and decreed that these petitioners should recover of the complainant the further sum of $370, with interest thereon at the rate of 8 per cent. per annum from the first day of each month following the respective months in which the articles constituting said sum of $370 were supplied; said articles being for ice furnished for the laborers employed upon said lock and dam, and the value of said ice being part of the wages of said laborers.

4. That the Court erred in overruling the first exception filed to the report of the Special Master by these petitioners; whereas the Court should have ordered, adjudged and decreed that these petitioners should recover of the complainant $589.20, with interest thereon at the rate of 8 per cent. per annum from June 1, 1903, being for labor supplied by petitioners during the month of May, 1903, for constructing said lock and dam.

5. That the Court erred in overruling the fourth exception filed to the report of the Special Master by these petitioners; whereas all the items mentioned in said fourth exception were for labor and materials furnished to said contractors and used in the prosecution of the work of constructing said lock and dam, and the Court should have ordered, adjudged and decreed that these petitioners should recover of the complainant the amount of said items, with interest thereon at the rate of 8 per cent. per annum from the first day of the month following the time said items were respectfully furnished.

235 6. That the Court erred in overruling the fifth exception filed to the report of the Special Master by these petitioners.

7. That the Court erred in overruling the sixth exception filed to the report of the Special Master by these petitioners.

8. That the Court erred in overruling the seventh exception filed to the report of the Special Master by these petitioners; whereas the Court should have ordered, adjudged and decreed that these petitioners recover of the complainant 15 per cent. on the amounts expended by them for ice mentioned in the assignment of error No. 3, with *with* interest thereon at the rate of 8 per cent. per annum from the first day of the month following the month in which said ice was furnished.

9. That the Court erred in overruling the eighth exception filed to the report of the Special Master by these petitioners; whereas the Court should have ordered, adjudged and decreed that these petitioners recover of the complainant 15 per cent. on all the items men-

tioned in the assignment of error No. 5 together with interest thereon, at the rate of 8 per cent. per annum, from the first day of the month following the month in which said items were furnished.

And these petitioners further assign errors and say:

10. That the Court erred separately in sustaining each of said exceptions filed by the Complainant, National Surety Company to the report of the Special Master, and relating to the claims of these petitioners.

11. That the Court erred in sustaining the first exception filed by the complainant to the report of the Special Master and relating to the claim of these petitioners.

12. That the Court erred in sustaining the second exception filed by the complainant to the report of the Special Master and relating to the claim of these petitioners.

13. That the Court erred in sustaining the third exception filed by the complainant to the report of the Special Master and relating to the claim of these petitioners.

14. That the Court erred in sustaining the fourth exception filed by the complainant to the report of the Special Master and relating to the claim of these petitioners.

15. That the Court erred in sustaining the fifth exception filed by the complainant to the report of the Special Master and relating to the claim of these petitioners.

16. That the Court erred in sustaining the first amended and additional exception filed by the complainant to the report of the Special Master and relating to the claim of the petitioners.

236–238 17. That the Court erred in sustaining the third amended and additional exception filed by the complainant to the report of the Special Master and relating to the claim of these petitioners.

18. That the Court erred in sustaining the fourth amended and additional exception filed by the complainant to the report of the Special Master and relating to the claim of the petitioners.

19. That the Court erred in sustaining the fifth amended and additional exception filed by the complainant to the report of the Special Master and relating to the claim of these petitioners.

* * * * * * *

239 EXHIBIT No. 1, WITH DEPOSITION OF R. P. PROWELL.

5 9	Cubic Yards Quoins	328.18
2 230	Cubic Yards Coping	6797.52
240 7 128	Cubic Yards Painted Face Masonry	2727.79
5 62	Cubic Yards Rock Face Masonry	1197.12
3 3368	Cubic Yards Rubble Masonry	27828.92

6 2	Cubic Yards Dry Rubble Masonry	22.45
6 3205	Cubic Yards Excavation	1509.83
1 1079	Cubic Yards Rock Excavation	2008.18
2 4053	Cubic Yards Embankment	1909.05
6 565	Cubic Yards Stone Filling	1109.99
6 481	Cubic Yards Paving	1134.16
914	Cubic Yards Rip-rap Hand Placed	1793.72
533	Lineal Feet Bolt Holes in Masonry	125.52
43874	Feet Board Measure Frame Timber	1584.28
5012	Feet Board Measure Meter Sills	196.72
10 per cent.	Grubbing and Cleaning	100.00
		$50373.39
	15 per cent. as per contract for services	7556.00
		$57929.39
	By cash from Willard & Cornwell	$26688.06
	Bal. due Hardaway & Prowell	$31241.33

In explanation of this Exhibit 1 and of the account of Hardaway & Prowell as filed, I desire to say that the account as filed is taken from our books just as the separate items were kept. These books were kept and the items therein going to make up the total cost of the materials put by us in the lock and dam, were set out, for our own conveniences, as it was necessary for us to know whom we were to pay for materials and labor and of what the materials consisted. In this statement, Exhibit 1, I have taken all these several items, purchase cost of materials and labor, which enter into and compose a part of the cost of materials as they were put into condition and placed as the contract required, and computed the total cost of the materials as so placed. This Exhibit 1 shows the total cost
241 of material as manufactured and placed in the lock and dam as required by the contract and is the true cost of the material as so manufactured and placed.

EXHIBIT TO THE DEPOSITION OF R. P. PROWELL. R. T. Nabors, Notary Public.

	Debits.	Commissary.
Perry Groc. Co. acc't	$222.25	$1529.20
Perry Groc. Co., note	460.56	
W. W. Callur & Co	.....	11.90
Strickland Bros	32.98	
Armour & Co	.30	586.20
Jake Foster	.....	63.04
Green & Huett	1.00	393.09

Allen & Jemison Co	3480.96	244.37
L. Rosenfield	.....	582.60
Cudahay Pack. Co	.....	171.90
Western Elevator	.....	21.50
Maxwell Bros	921.29	2531.19
c		
Tush Balling Works	.....	165.68
Gregory Vinegar Co	.....	68.25
J. R. Stallsworth	52.50	213.05
J. E. Baker	16.15	
c		
Tush Drug Co	.....	19.20
Friedman & Rosenan	.....	155.27
W. L. Dillheim	.....	10.03
	$5187.99	$6766.47
Am't forward	$5187.99	$6766.47
a		
Tush Lumber & Mfg. Co	7.71	
W. D. Barron	35.18	
Detroit Leath. Spec. Co	30.00	48.00
Hamilton Carheart	116.22	111.56
Snow Shoe Co	.....	9.85
C. B. Olmstead	3.54	
B. H. Hardaway	7979.34	
R. P. Prowell	4469.64	
W. M. Money	100.00	
Bills Payable	6810.56	
Eli Abbott	23.02	
W. A. Hauston	.....	3.30
Morgan Bros	1.50	
H. & Pow	$24764.70	$6939.18
H. & P. sold in Commissary	57410.59	
By cash from W. & Co	$82175.29	

242 EXHIBIT No. 2—EXHIBIT TO DEPOSITION OF R. P. PROWELL.
R. T. Nabors, Notary Public.

TIDEWATER, ALA., *May* 19, 1904.

Change for Payrolls.

18—	20.00	$360.00
31—	10.00	310.00
38—	5.00	190.00
166—	1.00	166.00
39—	.50	19.50
34—	.25	8.50
42—	.10	4.20
16—	.05	.80
		$1059.00

243 "AA."

EXHIBITS TO THE DEPOSITION OF R. P. PROWELL. Witness,, R. T. Nabors, Notary Public.

Hardaway and Prowell, in Account with Merchants' National Bank of Tuscaloosa, Ala.

Please examine and report.

DR.

1903.							
June	8	Check.....	.....	.....	.....	.....	$11.70
	9	Check.....	.....	.....	.....	.....	158.97
			10.00				
			11.55				
	15	Check.....	.....	.....	.....	.....	21.55
	18	Check.....	.....	.....	.....	.....	27.30
			536.70				
			11.60				
	20	Check.....	.....	.....	.....	.....	548.30
	22	Check.....	.....	.....	.....	.....	7.70
				2.60			
			5.00	2.10			
			2.40	10.00			
	29	Check.....	.....	.....	.....	.....	22.10

CR.

June	8	To Deposit...	.....	.....	.....	.....	$29.38

DR.

July	1	Check.....	.....	.....	.....	.....	$46.60
			6.50				
			30.45	32.50			
	2	Check.....	.....	.....	.....	.....	89.45
			32.75	100.00			
			37.60	26.80			
	3	Check.....	.....	.....	.....	.....	197.15
				2.88			
			6.00	7.50			
			26.91	27.64			
	6	Check.....	.....	.....	.....	.....	70.93
			5.10				
			8.00	100.00			
	11	Check.....	.....	.....	.....	.....	113.10
	13	Check.....	.....	.....	.....	.....	14.19
			777.50				
			63.67				
	16	Check.....	.....	.....	.....	.....	841.17
			150.00	300.00			
			250.00				

	17	Check.....	.....	.....	.....	.....	700.00
	18	Check.....	.....	.....	.....	.....	41.15
			11.82				
			50.00	12.15			
	20	Check.....	.....	.....	.....	.....	73.97
			189.16				
	21	Check.....	.....	.....	.....	.....	189.16
	22	Check.....	.....	.....	.....	.....	32.75
	23	Check.....	.....	.....	.....	.....	40.90
			28.70				
			11.55				
	24	Check.....	.....	.....	.....	.....	40.25
			55.79				
			9.60	128.95			
	25	Check.....	.....	.....	.....	.....	194.34
			4.20				
			13.75	2.55			
244							
	27	Check.....	.....	.....	.....	.....	20.50
			150.00				
			22.20	20.40			
	28	Check.....	.....	.....	.....	.....	192.60
			.....	9.90			
			3.00	20.55			
			8.75	14.94			
	30	Check.....	.....	.....	.....	.....	57.14
			5.30				
			8.40	6.95			
	31	Check.....	.....	.....	.....	.....	20.65
				Cr.			
July	17	To Deposit...	.....	.....	.....	.....	675.79
July	30	To Deposit...	.....	.....	.....	.....	1000.00
				Dr.			
Aug.	1	Check.....	.....	.....	.....	.....	150.00
			56.25				
			3.10	50.00			
	3	Check.....	.....	.....	.....	.....	109.35
			100.00				
			192.00	2.40			
	4	Check.....	.....	.....	.....	.....	294.40
	5	Check.....	.....	.....	.....	.....	22.72
	6	Check.....	.....	.....	.....	.....	50.00
			5.85				
			15.00				
	10	Check.....	.....	.....	.....	.....	20.85
			1.05				
			25.60	7.20			
	11	Check.....	.....	.....	.....	.....	33.85
			20.25	250.00			
			17.80	43.33	59.88		

14	Check.....	.....	.....	.....	.....	391.26
		17.35				
		381.15	12.00			
15	Check.....	.....	.....	.....	.....	410.50
		23.94	65.00			
		12.25	2.00			
17	Check.....	.....	.....	.....	.....	103.19
19	Check.....	.....	.....	.....	.....	3.40
		652.90				
		34.00	20.00			
21	Check.....	.....	.....	.....	.....	706.90
		10.80	850.00			
		58.51	18.95	64.86		
22	Check.....	.....	.....	.....	.....	1003.12
		50.00	5.74			
		13.80	52.50			
24	Check.....	.....	.....	.....	.....	122.04
		50.00				
		100.00				
25	Check.....	.....	.....	.....	.....	150.00
		26.75				
		20.65	50.00			
26	Check.....	.....	.....	.....	.....	97.40
		10.75				
		200.00				
27	Check.....	.....	.....	.....	.....	210.75
		7.70				
		22.30	12.90			
29	Check.....	.....	.....	.....	.....	42.90
29	Check.....	.....	.....	.....	.....	380.95
31	Check.....	.....	.....	.....	.....	11.80

Cr.

245

Aug. 14	To Deposit...	.....	.....	.....	.....	650.00
17	To deposit....	.....	.....	.....	.....	100.00
21	To deposit....	.....	.....	.....	.....	2090.63
27	To deposit....	.....	.....	.....	.....	200.00
29	To deposit....	.....	.....	.....	.....	150.00

Dr.

Sept. 2	Check.....	.....	.....	.....	.....	4.54
		416.20	86.10			
		255.20	57.60	4000.00		
5	Check.....	.....	.....	.....	.....	4815.10
		37.56				
		7.53	3.18			
8	Check.....	.....	.....	.....	.....	48.27
9	Check.....	.....	.....	.....	.....	23.26

Cr.

Sept.	5	To deposit....	.....	.....	.....	.....	5000.00
	10	Check.....	.....	.....	.....	.....	50.00
	14	Check.....	.....	.....	.....	.....	18.48
			333.25				
			235.81				
	15	Check.....	.....	.....	.....	.....	569.06
	16	Check.....	.....	.....	.....	.....	49.96
			.....	44.16			
			82.72	25.00			
			55.49	62.15			
	17	Check.....	.....	.....	.....	.....	269.52
	18	Check.....	.....	.....	.....	.....	100.00
			1027.35				
			700.00				
	19	Check.....	.....	.....	.....	.....	1727.35
			50.00	6.86			
			100.00	18.65			
	21	Check.....	.....	.....	.....	.....	175.51
			1.00				
			3.20	45.60			
	23	Check.....	.....	.....	.....	.....	49.80
	25	Check.....	.....	.....	.....	.....	102.60
	26	Check.....	.....	.....	.....	.....	4.00
			4.75	.....	6.05		
			8.30	1.20	5.90	3.00	
			167.85	4.55	60.00	.65	
	28	Check.....	.....	.....	.....	.....	262.25
			22.12				
			66.40				
	29	Check.....	.....	.....	.....	.....	88.52

Cr.

Sept.	16	To Deposit...	.....	.....	.....	.....	13104.42
	21	To deposit....	.....	.....	.....	.....	2852.37
							496.33

Hardaway & Prowell Account—Continued.

Dr.

			100.00				
			20.00				
Oct.	1	.....	.....	.....	.....	.....	120.00
			109.44				
			1.00				
	2	Check.....	.....	.....	.....	.....	110.40
	3	Check.....	.....	.....	.....	.....	13.40
			615.25	1.20			
			3.30	5.25			
	5	Check.....	.....	.....	.....	.....	625.00
	7	Check.....	.....	.....	.....	.....	6.05

	9	Check.....	.....	.....	.....	.....	85.86
246			6.50	2.77	5.60		
			.75	1.00	54.55		
	12	Check.....	.....	.....	.....	.....	71.17
			100.00				
			400.98				
	14	Check.....	.....	.....	.....	.....	500.98
			155.00				
			45.00				
	15	Check.....	.....	.....	.....	.....	200.00
			300.00				
			300.00				
	16	Check.....	.....	.....	.....	.....	600.00
	17	Check.....	.....	.....	.....	.....	779.05
			80.85				
			2.00	200.00			
	20	Check.....	.....	.....	.....	.....	282.85
	23	Check.....	.....	.....	.....	.....	6.06
	24	Check.....	.....	.....	.....	.....	863.50
	26	Check.....	.....	.....	.....	.....	12.40
	27	Check.....	.....	.....	.....	.....	34.30
			2.70				
			6.20	.85			
	31	Check.....	.....	.....	.....	.....	9.75

Cr.

Oct.	1	To deposit....	.....	.....	.....	.....	250.00
	3	To deposit....	.....	.....	.....	.....	200.00
	5	To deposit....	.....	.....	.....	.....	400.00
	13	To deposit....	.....	.....	.....	.....	2617.68
	24	To deposit....	.....	.....	.....	.....	800.00
							20720.80

Dr.

Nov.	2	Check.....	.....	.....	.....	.....	3.32
			3.70				
			7.78				
	4	Check.....	.....	.....	.....	.....	11.48
	5	Check.....	.....	.....	.....	.....	32.00
			36.40				
			23.75				
	6	Check.....	.....	.....	.....	.....	60.15
							20874.98
Nov.	—	Forward checks.....					20874.98
			15.86				
			27.13	2.00			
	9	Checks.....	.....	.....	.....	.....	44.99
	10	Checks.....	.....	.....	.....	.....	100.00
	11	Checks.....	.....	.....	.....	.....	3.67

16	Checks.....	.....	.....	.....	.....	22.03
		74.89	27.00	1808.82	600.00	
		62.10	800.00	226.24	46.00	
17	Checks.....	.....	.....	.....	.....	3645.05
18	Checks.....	.....	.....	.....	.....	7.00
		18.34				
		38.80				
19	Checks.....	.....	.....	.....	.....	57.14
		935.85				
		200.00				
20	Checks.....	.....	.....	.....	.....	1135.85
21	Checks.....	.....	.....	.....	.....	2.50
		40.64				
		66.40				
32	Checks.....	.....	.....	.....	.....	107.04
		106.02				
		16.93				
24	Checks.....	.....	.....	.....	.....	122.95
247						
28	Checks.....	.....	.....	.....	.....	499.20
		30.50				
		5.00				
30	Checks.....	.....	.....	.....	.....	35.50

Cr.

Nov.	Forward deposits.....	20720.80
17	To deposit....	5063.82
28	To deposit,....	1000.00

Dr.

		500.00				
		5.00	.40			
Dec. 4	Checks.....	.....	.....	.....	.....	505.40
5	Checks.....	.....	.....	.....	.....	49.88
		5.09				
		18.34				
7	Checks.....	.....	.....	.....	.....	23.43
9	Checks.....	.....	.....	.....	.....	30.00
		18.34	325			
		3.00	5.00			
12	Checks.....	.....	.....	.....	.....	351.34
		19.20	50.00			
		9.00	1605.11			
14	Checks.....	.....	.....	.....	.....	1683.31
		30.44				
		15.00				
15	Checks.....	.....	.....	.....	.....	45.44
16	Checks.....	.....	.....	.....	.....	40.00
18	Checks.....	.....	.....	.....	.....	75.00
19	Checks.....	.....	.....	.....	.....	19.50

	21	Checks.....	.....	.....	.....	.....	5.00
			1385.60	100.00			
			100.00				
	23	Checks.....	.....	.....	.....	.....	1585.60
	24	Checks.....	.....	.....	.....	.....	38.60

Cr.

Dec.	4	To deposit....	.....	.....	.....	.....	600.00
	14	To deposit....	.....	.....	.....	.....	3091.69
	21	To deposit....	.....	.....	.....	.....	29.40
	23	To deposit....	.....	.....	.....	.....	500.00

Dr.

1904.							
			50.00				
			33.09	3.00			
Jan.	2	Checks.....	.....	.....	.....	.....	86.09
			500.00	190.00			
			37.95	1.25			
	4	Checks.....	.....	.....	.....	.....	729.20
	5	Checks.....	.....	.....	.....	.....	316.35
	8	Checks.....	.....	.....	.....	.....	3.00
	9	Checks.....	.....	.....	.....	.....	525.00
	11	Checks.....	.....	.....	.....	.....	5.00
			2.58				
			10.30				
	12	Checks.....	.....	.....	.....	.....	12.88
	13	Checks.....	.....	.....	.....	.....	7.50
	15	Checks.....	.....	.....	.....	.....	18.20
			500.00	16.28			
			50.00				
	16	Checks.....	.....	.....	.....	.....	566.28
	18	Checks.....	.....	.....	.....	.....	10.00
			4.55	2.15			
			2.00	.75			
	20	Checks.....	.....	.....	.....	.....	9.45
			500.00				
			50.00				
248							
	21	Checks.....	.....	.....	.....	.....	5.50
	22	Checks.....	.....	.....	.....	.....	3.00
	23	Checks.....	.....	.....	.....	.....	992.85
			10.03				
			5.00	1.00			
	25	Checks.....	.....	.....	.....	.....	16.03
			150.00				
			1.50				
	26	Checks.....	.....	.....	.....	.....	151.50
			285.00	111.56			
			2.25	18.00			

	28	Checks.....	.....	.....	.....	416.81
			52.66			
			72.98	30.00		
	30	Checks.....	.....	.....	.....	155.64

Cr.

1904.						
Jan.	2	To deposit....	.....	.....	.....	1000.00
	9	To deposit....	.....	.....	.....	850.00
	16	To deposit....	.....	.....	.....	500.00
	20	To deposit....	.....	.....	.....	2967.36
	21	To deposit....	.....	.....	.....	10.00

Dr.

Feb.	1	Checks.....	.....	.....	.....	8.31
	2	Checks.....	.....	.....	.....	123.32
			14.65			
			28.97			
	3	Checks.....	.....	.....	.....	43.62
			39.77	2.25		
			38.98	70.00		
	5	Checks.....	.....	.....	.....	151.00
			7.78			
			1000.00	443.05		
	6	Checks.....	.....	.....	.....	1450.83
			7.00			
			1.10	1.25		
	8	Checks.....	.....	.....	.....	9.35
	11	Checks.....	.....	.....	.....	108.19
	12	Checks.....	.....	.....	.....	7.50
	13	Checks.....	.....	.....	.....	50.00
			25.00			
			6.00			
	15	Checks.....	.....	.....	.....	31.00
			1000.00			
			65.50			
	20	Checks.....	.....	.....	.....	1065.50
			35.58			
			23.25			
	23	.....	.....	.....	.....	58.83

Cr.

Feb.	5	To deposit....	.....	.....	.....	500.00
	8	To deposit....	.....	.....	.....	6.50
	11	To deposit....	.....	.....	.....	100.00
	13	To deposit....	.....	.....	.....	50.00
	20	To deposit....	.....	.....	.....	1183.07

Dr.

Mar.	5	Checks.....	.....	.....	.....	958.60
	8	Checks.....	.....	.....	.....	11.35

	9	Checks.....	.....	.....	.....	.....	2.50
			700.00				
			103.33				
	18	Checks.....	.....	.....	.....	.....	803.33
	21	Checks.....	.....	.....	.....	.....	63.30
			162.50	100.00			
249							
			68.00	111.39			
	22	Checks.....	.....	.....	.....	.....	441.89
	23	Checks.....	.....	.....	.....	.....	50.00

Cr.

Mar.	5	To deposit....	.....	.....	.....	.....	1000.00
	18	To deposit....	.....	.....	.....	.....	1000.00
	21	To deposit....	.....	.....	.....	.....	1070.36

Dr.

Apr.	2	Checks.....	.....	.....	.....	.....	558.45
	4	Checks.....	.....	.....	.....	.....	.52
	5	Checks.....	.....	.....	.....	.....	3.00
	7	Checks.....	.....	.....	.....	.....	32.75
			43.17				
			6.13				
	8	Checks.....	.....	.....	.....	.....	49.30
	12	Checks.....	.....	.....	.....	.....	33.13
	16	Checks.....	.....	.....	.....	.....	525.00
	20	Checks.....	.....	.....	.....	.....	28.85
	29	Checks.....	.....	.....	.....	.....	500.00

Cr.

Apr.	14	To deposit....	.....	.....	.....	.....	40.00
	28	To deposit....	.....	.....	.....	.....	503.35
	29	To deposit....	.....	.....	.....	.....	500.00

Dr.

May	9	Checks.....	.....	.....	.....	.....	66.94
	16	Checks.....	.....	.....	.....	.....	8.00
	17	Checks.....	.....	.....	.....	.....	22.10
			41.65	6.45			
			43.65	12.89			
	20	Checks.....	.....	.....	.....	.....	104.64
	21	Checks.....	.....	.....	.....	.....	200.00
	31	Checks.....	.....	.....	.....	.....	9.60
							43265.88
May	21	To deposit....	.....	.....	.....	.....	269.33
	23	To deposit....	.....	.....	.....	.....	60.00
							43259.23
June		Checks forward	.....	.....	.....	.....	43265.88
			103.33	39.68			
			552.85	31.95			

11	Checks.....	.....	.....	.....	.....	727.81
		9.00				
		5.25				
15	.....	.....	.....	.....	.....	14.25
		51.14	39.90			
		600.95	746.96			
18	Checks.....	.....	.....	.....	.....	1438.95
		30.30				
		7.55	7.90			
20	Checks.....	.....	.....	.....	.....	45.75
		297.45				
		273.80				
25	Checks.....	.....	.....	.....	.....	571.25
26	Checks.....	.....	.....	.....	.....	141.20
28	Checks.....	.....	.....	.....	.....	7.55
30	Checks.....	.....	.....	.....	.....	20.00

Cr.

June	Deposits forward.....		.....	.....	.....	43259.23
11	To deposits...	.....	.....	.....	.....	755.55
18	To deposits...	.....	.....	.....	.....	1500.00
26	To deposits...	.....	.....	.....	.....	1240.36

Dr.

July 1	Checks.....	.....	.....	.....	.....	50.00
		31.70				
		203.25				
250						
2	Checks.....	.....	.....	.....	.....	324.95
5	Checks.....	.....	.....	.....	.....	71.16
6	Checks.....	.....	.....	.....	.....	156.00
8	Checks.....	.....	.....	.....	.....	20.00
9	Checks.....	.....	.....	.....	.....	104.20
16	Checks.....	.....	.....	.....	.....	287.00
18	Checks.....	.....	.....	.....	.....	6.45
20	Checks.....					
		20.85				
		21.20				
21	Checks.....	.....	.....	.....	.....	42.05
23	Checks.....	.....	.....	.....	.....	139.30
26	Checks.....	.....	.....	.....	.....	82.36
29	Checks.....	.....	.....	.....	.....	34.86
30	Checks.....	.....	.....	.....	.....	210.90

Cr.

July 9	To deposit....	.....	.....	.....	.....	104.20
16	To deposit....	.....	.....	.....	.....	287.00
20	To deposits...	.....	.....	.....	.....	941.43

DR.

Aug.	5	Checks.....	.....	.....	.....	.....	25.00
	6	Checks.....	.....	.....	.....	.....	245.90
	11	Checks.....	.....	.....	.....	.....	7.75
	13	Checks.....	.....	.....	.....	.....	96.60
	17	Checks.....	.....	.....	.....	.....	8.22
			216.28				
			54.20				
	24	Checks.....	.....	.....	.....	.....	270.48
			35.00				
			679.18				
	26	Checks.....	.....	.....	.....	.....	714.18
			7.66	350.45			
			33.78	330.00			
	27	Checks.....	.....	.....	.....	.....	721.89
	29	Checks.....	.....	.....	.....	.....	15.20
	31	Checks.....	.....	.....	.....	.....	10.35

CR.

Aug.	24	To deposits...	.....	.....	.....	.....	330.00
	26	To deposits...	.....	.....	.....	.....	1500.00

DR.

Sept.	3	Checks.....	.....	.....	.....	.....	310.20
	7	Checks.....	.....	.....	.....	.....	24.55
			252.15				
			1.25				
	10	Checks.....	.....	.....	.....	.....	253.40
			21.21				
			19.05				
	12	Checks.....	.....	.....	.....	.....	40.26
	23	Checks.....	.....	.....	.....	.....	50.00
	24	Checks.....	.....	.....	.....	.....	45.10
	26	Checks.....	.....	.....	.....	.....	755.60

CR.

Sept.	3	To deposits...	.....	.....	.....	.....	300.00
	10	To deposits...	.....	.....	.....	.....	300.00
	26	To deposits...	.....	.....	.....	.....	800.00
	28	To deposits...	.....	.....	.....	.....	48.35

DR.

Oct.	3	Checks.....					
	3	Checks.....	.....	.....	.....	.....	12.80
			6.45				
			700.00	40.40			
	8	Checks.....	.....	.....	.....	.....	746.85
	17	Checks.....	.....	.....	.....	.....	15.00
	18	Checks.....	.....	.....	.....	.....	152.78

	19	Checks.....	.....	.....	.....	.....	40.30
251			28.90				
			140.34				
	20	Checks.....	.....	.....	.....	.....	169.24
	22	Checks.....	.....	.....	.....	.....	951.50
	26	Checks.....	.....	.....	.....	.....	30.00
			20.00				
			30.60				
	31	Checks.....	.....	.....	.....	.....	50.60
				Cr.			
Oct.	8	To deposits...	.....	.....	.....	.....	900.00
	17	To deposits...	.....	.....	.....	.....	1290.69
				Dr.			
Nov.	1	Checks..	.....	.....	.....	.....	30.60
	4	Checks..	.....	.....	.....	.....	30.60
	26	Checks..	.....	.....	.....	.....	250.00
				Cr.			
Nov.	30	To deposits...	.....	.....	.....	.....	1607.68
				Dr.			
Dec.	1	Checks.....	.....	.....	.....	.....	14.80
	3	Checks.....	.....	.....	.....	.....	5.08
			250.00				
			102.31				
	5	Checks.....	.....	.....	.....	.....	352.31
	6	Checks.....	.....	.....	.....	.....	20.52
	8	Checks.....	.....	.....	.....	.....	19.10
			257.05				
			160.05				
	10	Checks.....	.....	.....	.....	.....	417.10
	15	Checks.....	.....	.....	.....	.....	26.45
	16	Checks.....	.....	.....	.....	.....	25.00
	20	Checks.....	.....	.....	.....	.....	133.54
	22	Checks.....	.....	.....	.....	.....	37.86
	27	Checks.....	.....	.....	.....	.....	4.00
	29	Checks.....	.....	.....	.....	.....	30.35
	30	Checks.....	.....	.....	.....	.....	57.35
	31	Checks.....	.....	.....	.....	.....	35.11
				Cr.			
Dec.	10	To deposit...	.....	.....	.....	.....	141.19
1905.				Dr.			
			23.40				
			8.50				
Jan.	3	Check.....	.....	.....	.....	.....	31.90
	4	Check.....	.....	.....	.....	.....	18.00

	5	Check					11.90
	6	Checks					39.34
	12	Checks					3.30
	20	Checks					6.05
Feb.	7	Checks					52.50
	9	Checks					9.00
	10	Checks					1.50
	14	Checks					69.95
May	16	Checks					88.90
	22	Checks					4.00
1905.			Cr.				
May	16	To deposit					60.00
			Dr.				
Sept.	1	Checks					19.55
			70.19	135.47			
			6.95				
Nov.	1	Checks					212.61
							$55583.89
252			Cr.				
Nov.	1	To deposit					218.21
							$55583.89
		B. H. Hardaway, Check				1000.00	
		R. P. Prowell, Check				826.70	
							1826.70
							$57410.59

[SEAL.] A. G. RONALD.

WESTERN DISTRICT OF KENTUCKY, *ss:*

I, A. G. Ronald, Clerk of the Circuit Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 437 pages contain a true and correct transcript of so much of the record and proceedings in the cause mentioned in the caption hereof, as I was directed to copy by the Præcipe filed by counsel for the appellants which is made a part hereof, as the same appears from the files and records in my said office.

Witness my hand and seal of said Court, this 11th day of June, 1906.

[SEAL.] A. G. RONALD,
Clerk of U. S. Circuit Court, Western Dist. of Kentucky,
By HENRY F. CASSIN,
Deputy Clerk.

253 And afterwards, to-wit: on the 22nd day of June, A. D. 1906, an appearance was filed in said cause clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1584.

B. H. HARDAWAY ET AL.
vs.
NATIONAL SURETY CO.

Frank O. Loveland, Clerk of said Court:

Please enter *my* appearance as Counsel for the Appellants.

BODLEY & BASKIN,
Louisville, Ky.
FOSTER & OLIVER,
Tuscaloosa, Ala.

And on a day following, to-wit: on the 14th day of December, A. D. 1906 an entry was made upon the journal of said court clothed in the words and figures following, to-wit:

Journal C, Page 345.

Before Lurton, Severens, and Richards, Circuit Judges.

No. 1584.

HARDAWAY & PROWELL
vs.
NATIONAL SURETY CO.

254 This cause is argued for appellants by Mr. John B. Baskin and for appellee by Mr. Henry Fitts and cause submitted.

And afterwards, to-wit: on the 8th day of January 1907 a decree was rendered in said cause clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1584.

HARDAWAY & PROWELL
vs.
NATIONAL SURETY CO.

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause be and the same is hereby affirmed with costs.

And afterwards, to wit: on the 19th day of January, an opinion was filed in said cause clothed in the words and figures following, to-wit:

255 No. 1584.

United States Circuit Court of Appeals, Sixth Circuit.

HARDAWAY & PROWELL
vs.
NATIONAL SURETY CO.

Appeal from the United States Circuit Court for the Western District of Kentucky.

Submitted December 14, 1906; Decided January 8, 1907.

Before Lurton, Severens, and Richards, Circuit Judges.

LURTON, Circuit Judge, delivered the opinion of the court:

This appeal involves only the liability of the National Surety Company, as surety upon a Government contractor's bond made in pursuance of the Act of Congress of August 13th, 1894, 28 Statutes at Large 278, to the appellants, Hardaway and Prowell, who claim to have supplied the contractors and principal obligors in the bond with labor and material. The only facts necessary to be stated are these. The firm of Willard & Cornwell, composed of James E. Willard, Charles L. Cornwell and Joseph Coyne, contracted on October 5th, 1899, with the Government for the construction of lock and dam Number 4, Black Warrior River, Alabama. This contract involved the supplying of a large amount of materials and labor, and the contractors were required to execute a bond in the penal sum of $50,000.00, conditioned, first, that the contractors would perform their contract according to its true intent and meaning, and
256 second, that "they would make full payments to all persons supplying them labor or materials in the prosecution of the work provided for in said contract." They executed this bond with the National Surety Company as surety.

The contractors prosecuted the work as a firm for a year or more and then, for reasons not necessary to be stated, Willard and Cornwell assigned their interests in the contract to their associate, Joseph Coyne, who agreed to assume all debts of the firm and prosecute the work at his own risk and for his own benefit. As between the partners, we see no valid objection to this agreement. It could not affect the United States and was never intended to substitute Coyne for Willard, Cornwell and Coyne, and was effective only as an as-

sumption by one of the firm of the debts of the firm in consideration of the receipt of the benefits to be derived from the execution of the agreement. Bank *v.* Taylor, 152 U. S. 634; and Prairie Bank *v.* U. S., 164 U. S. 227. Coyne went on with the contract, but at last found himself unable to complete the work. In this situation he entered into a contract for the completion of the work with the appellants, Hardaway & Prowell. As the legal right of Hardaway & Prowell to look to the bond originally given by Willard & Cornwell with the appellee, the National Surety Company, as surety, for their protection, depends upon the true intent and meaning of this contract, it is here set out in full:

STATE OF ALABAMA, *Tuscaloosa County:*

This contract made this the 2nd day of June, 1903, by and between B. H. Hardaway and R. P. Prowell, hereinafter called Hardaway & Prowell, as parties of the first part, and Joseph Coyne, as party of the second part, witnesseth:

That, whereas, Willard & Cornwell, a firm Composed of J. E. Willard, C. R. Cornwell and the said Joseph Coyne, did, heretofore, on to-wit, the — day of —, 1899, enter into a contract with the United States for the construction of Lock No. 4 in the Black Warrior River above Tuscaloosa, Alabama, and whereas, shortly after the beginning of the work upon said lock the said Joseph Coyne, by an arrangement between him and his co-partners, un-
257 dertook to complete and finish said lock according to the specifications of the contract of said firm with the United States, and in consideration of such an undertaking acquired the beneficial interest of said firm in said contract and was to receive all amounts paid by the United States in consideration of such contract, and whereas, said lock is still uncompleted, and the said Joseph Coyne can not, on account of his inability to procure the necessary financial aid and on account of the disorganization of his labor forces and for various and sundry other reasons, complete and finish the said work in accordance with the said contract, and whereas said contract is a valued asset to the said Joseph Coyne if the said work can be prosecuted to its completion under the terms of said contract, there being held in reserve by the government under the terms of said contract about $8300.00, which has already been earned by said Coyne, and whereas by reason of his said inability to finish said work the said contract is about to be forfeited, and the said Coyne is in imminent danger of losing, not only what profits may be made upon the completion of the work, but the entire reserve fund also retained by the government, and whereas the said Joseph Coyne for the purpose of preventing the forfeiture of said contract, has made overtures to the said Hardaway & Prowell to take up said work and complete it, and the said Hardaway & Prowell have agreed to do so upon the terms and stipulations hereinafter set forth; now, therefore,

1. The said Hardaway & Prowell do hereby undertake and agree

with the said Joseph Coyne to superintend the completion of the said lock and dam No. 4 and to furnish the necessary finances for the completion thereof, and to put in charge of said work a competent superintendent and to properly organize the work for an energetic prosecution thereof to completion for which services they are to receive an agreed compensation of 15 per cent. upon the total cost of completing said contract, which total cost shall be construed to include all amounts necessarily expended and expenses incurred by Hardaway & Prowell in the completion of said work and all amounts necessarily paid and expenses incurred by them to effect a settlement with and an acceptance of said lock and dam by the United States.

2. The said Joseph Coyne agrees to the above compensation for Hardaway & Prowell and further agrees to turn over to them entire charge of the completion of said work, and not to interfere with them in any way in the prosecution of said work to com-
258 pletion, and further agrees to turn over to the said Hardaway & Prowell the entire outfit of machinery, tools, etc., which he now has at said lock and dam and the quarries where he is getting stone, and to give the use of the same to them for the completion of said work free of any charge.

3. The said Joseph Coyne further agrees to have all checks for each estimate upon said work forwarded by the government to the said Hardaway & Prowell and to properly endorse such checks so that they may be collected by Hardaway & Prowell.

4. It is further agreed by all parties hereto that out of the proceeds of the checks referred to in the next foregoing paragraph the obligations shall be paid preferentially in the following order:

1. The compensation of the said Hardaway & Prowell as herein agreed for their services.

2. All moneys advanced by Hardaway & Prowell and used in the prosecution of said work.

3. All debts necessarily incurred by the said Hardaway & Prowell for the prosecution of said work other than debts for labor and material.

4. All debts incurred by said Hardaway & Prowell for labor and material or moneys advanced by them in payment for labor or material debts.

5. The said Joseph Coyne, for the completion of said work and for the securing to the said Hardaway & Prowell all amounts, that they shall have to pay on whatever account for the completion of said lock and dam and for a settlement with the United States and acceptance of said lock and dam by the proper authorities of the government, does hereby assign and set over to the said Hardaway & Prowell all his interest in the amount, aggregating as aforesaid about $8300.00, retained and now held in reserve by the government under the said contract for the building of said lock and dam, which shall be applied by the said Hardaway & Prowell in the following order:

1. To the payment of all debts for labor and material incurred in the building of said lock and dam.

2. Any balance that may be due to said Hardaway & Prowell for their compensation under this contract.

3. All other necessary debts incurred in the prosecution of the said work by Hardaway & Prowell and all amounts including expenses which they shall have to pay in order to effect a settlement with the government and acceptance by it of said lock and dam.

4. Any balance to be paid to the said Joseph Coyne.

6. It is understood and agreed by all parties hereto that
259 if the said Joseph Coyne should at any time fail or be unable to turn over to the said Hardaway & Prowell the checks for estimates on said work properly endorsed so that Hardaway & Prowell can collect them or should fail to secure the collection of them by the said Hardaway & Prowell then the said Hardaway & Prowell shall in that event have the option of annulling said contract and stopping work without notice to the said Joseph Coyne, or to any other parties whomsoever, but in said event the said Hardaway & Prowell shall have a claim against the said Joseph Coyne for all moneys furnished by them and expenses incurred by them upon any account whatsoever in the prosecution of said work, and which shall not have been repaid to them, and for all compensation earned under this contract and not paid to them, and such claim shall be due and payable at once upon their termination of the contract.

In witness whereof the said parties of the first and second parts have hereunder set their hands and seals in duplicate, this the day and year first above written.

B. H. HARDAWAY.
R. P. PROWELL.
JOSEPH COYNE.

Attest: C. B. VERNER.

Storms, freshets and overflows, as claimed by the appellants, added to the cost of completing the unfinished lock and dam, so that when the work was finally accepted by the government they had expended for work and labor, including their own commissions under their agreement with Coyne, the sum of about $36,000.00, in excess of the moneys collected by them from the government according to the terms of their agreement with Coyne. The question is, whether this loss is one which constitutes a claim for labor and materials supplied the contractors for the prosecution of the work within the meaning of the bond.

The bond required under the Act of August 13th, 1894, has two distinct purposes. First, it is intended to secure the fulfillment of the agreement between the principal contractors and the government, and by an amendment of the act made February 24, 1905, 33 Statutes at Large 811, preference is given to this provision of the contract. The second condition of the bond is exclusively for the
protection of persons supplying labor and materials to the
260 contractors. The contract has been carried out. The government has accepted the lock and dam, and the obligation of the bond in its primal aspect has been discharged. The benefits of the bond in its secondary aspect are not limited to those directly

supplying the contractors with labor and materials. In Hill *v.* American Surety Company, 200 U. S. 197, 205, it was said by Justice Day, speaking for the court, "In view of the declared purpose of the statute, in the light of which this bond must be read, and considering that the act declares in terms the purpose to protect those who have furnished labor or material in the prosecution of the work, we think it would be giving too narrow a construction to its terms to limit its benefits to those only who supply such labor or materials directly to the contractor. The obligation is 'to make full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract.' This language, read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied. If the contractor sees fit to let the work to a subcontractor, who employs labor and buys materials which are used to carry out and fulfill the engagement of the original contract to construct a public building, he is thereby supplied with the materials and labor for the fulfillment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials."

In Hill *v.* American Security Company, the principal contractor was the New Jersey Foundry Company. That company subcontracted a part of the work to the Richard Manufacturing Company. This subcontractor employed the two Hills to do certain of the work they had undertaken to do, and agreed to pay them $246.80 in full. The subcontractor only paid part and the Hills were held to be persons who had supplied labor and materials to the original contractors within the meaning of the bond, and were given a judgment, not
261 for the value of the labor and materials, but for the balance of the price which the contractors had agreed to pay them and which they had agreed to accept, the sum of $141.80. Thus it is clear, that under this very satisfactory and authoritative opinion, the appellants, Hardaway & Prowell, will be entitled to proceed against the bond given by Willard and Cornwell for any balance due them upon the price which Coyne in good faith agreed to pay them for the completion of the lock and dam in question, provided they occupy the attitude of subcontractors who have furnished labor and materials to the contractors. Whether Coyne, after he had acquired the beneficial interest of his partners in the contract and assumed its burdens, is to be regarded as an original principal contractor or as a subcontractor is of no practical importance. In either event persons who supplied him with labor and materials for the carrying on of the contract were within the protection of the bond, according to Hill *v.* American Surety Company. This the court below held, and all such claimants were given decrees against the bond. From these decrees the National Surety Company has not appealed. Neither does it make any difference in determining the liability of the bond to Hardaway and Prowell, whether we regard Coyne as an original or as a subcontractor. In either event, persons supplying him with labor and materials with which to execute the

contract with the government would be within the intent of the bond.

The contract between appellants and Coyne, set out above, is not free from obscurity. Appellants insist that they became mere subcontractors under Coyne, and that they were to receive from Coyne the entire amount of the cost to them of the work and a commission of 15 per cent. upon the gross expenditures. Upon this interpretation, they say that the balance remaining after applying the amounts paid them, through Coyne in government checks, for work theretofore done and for work completed by them, constitutes a claim for labor and materials supplied by them as subcontractors for which Coyne is liable to them. This interpretation is not easy to defend,
and is not the most natural one in view of all the provisions of
262 the contract. First: there is the conceded fact that there is no express provision to that effect. If this had been the agreement as the parties understood it, we would expect to find so important a provision explicitly stated. But counsel say that the law implies such an agreement. Undoubtedly, in the absence of any stated consideration, the law does imply that one who performs work or supplies materials to another at his request, shall be paid either their cost or their reasonable value. But is that this case? From the recitals of the contract itself it is plain that Coyne's trouble was that he did not have the capital necessary to go on.

He found that he would have to forfeit the contract and with it the $8,300.00, already earned but reserved by the government until completion of the work. Thus it is recited that the lock "was still uncompleted on account of his inability to procure the necessary financial aid——"

It is true that it is also said, that Hardaway & Prowell are "to take up said work and complete it," but the way in which they are to do this is to be found in the terms and stipulations which directly follow. Thus they agree; first, to superintend the construction of the work, second, they agree to put in a competent superintendent; third, to reorganize Coyne's demoralized labor force. These are all things consistent with a mere superintendence or management in the interest of Coyne. The next, and last stipulation, is of most moment. It is that "they will furnish the necessary finances for the completion thereof." Now if Hardaway & Prowell are to go on as mere subcontractors and finish the work, supplying the necessary labor and materials and receiving an agreed consideration for the work, why this explicit agreement to furnish necessary finances to complete the work? Especially is this significant in view of the fact that there is no agreement that they shall supply the necessary labor and materials to finish the work. If, as contended there is an implied agreement to reimburse every outlay by Hardaway & Prowell in completing this work, is it more than an implied agreement to repay the money advanced under this contract to "furnish the necessary finances" to complete the job? In short, is not the agree-
263 ment one by which the appellants are to supply the money and superintend its expenditure, this supervision enabling them to protect themselves against diversion? To repay the advances, the contract provides that future payments, earned by the

prosecution of the work, should be endorsed over to Hardaway and Prowell, who after paying their own commission should pay out the rest in reimbursement of their advances or in payment of debts incurred on account of the work.

This provision as to paying debts incurred for labor and materials is manifestly to relieve the contractors' bond.

For the further "securing" of Hardaway & Prowell, it is also provided that the $8,300.00 already earned should be assigned to them to the extent necessary. By way of compensation for what are called the "services of Hardaway & Prowell, it is then provided that they shall have 15 per cent. commission upon their gross outlay, whether for labor or materials or other expenses. The attitude of Hardaway & Prowell as mere lenders of money is not, in substance, changed because that money was used in paying for labor and materials. Nor is the character of the claim, in its essence, changed by presenting it in the form of an account for the labor and materials which was procured by its application. Manifestly, if the money had been loaned to Coyne under the express agreement that he was to use it in supplying labor and materials to be used in this work, and it was so used, the debt would still be a debt for money advanced and not a debt for labor and materials, though every dollar was so applied. The same result must follow if Hardaway & Prowell, as mere superintendents, or managers for Coyne, used the money advanced by them in paying for like supplies. In both hypotheses the labor and materials would be supplied by Coyne, although the money which paid for them had been advanced by the appellants. Would a bank lending money to Coyne to be used by him in carrying out this contract be entitled to the protection of such a contractor's bond simply because the money was to be used and was, in fact, used in paying for labor and materials which were used in the work? If not, how much stronger is the equity
264 of appellants even if they themselves used the money in paying for labor and materials which went into the work, if in so applying it, they were merely acting as the agents, or superintendents of Coyne? Money loaned would not be labor and materials. The labor hired and the persons actually supplying them with labor and materials might be protected as persons furnishing labor and materials to them as subcontractors or as mere superintendents standing for and representing Coyne as a principal or subcontractor. But as mere agents for Coyne advancing money to him or for him, by paying for labor and materials supplied by others, they would not be subcontractors nor persons supplying subcontractors with labor and materials. One who lends money to keep a broken down railroad in operation and to pay for labor and necessary supplies has never been regarded as entitled to the equitable lien accorded to those who actually supply labor and materials to keep the road going. Morgan's Louisiana, etc. Ry. Co. *v.* Texas Central Ry. *et al.*, 137 U. S. 171; U. S. Trust Company *v.* Western Contract Co., 81 F. R. 454. Money borrowed and used to pay labor claims entitles the lender to no preference in the absence of an assignment of the claims. Theobold *v.* Hammond, 133 F. R. 525.

But if this is not a mere agreement to "finance" Coyne and superintend the disbursement of the money advanced, we are led to the conclusion, that, if subcontractors, they were so only under a special agreement to complete the work with Coyne's plant and his quarry for that part of the original contract price which would be earned by so doing.

If this proved insufficient to reimburse them, then they might look to the reserved percentage in the hands of the government, amounting to $8,300.00, to the extent necessary to do that and to pay them their commissions, but no further. This view is borne out by a number of considerations. Among them is the fact that no stipulation is found looking to any other or further consideration when it would have been most natural, if the intent had been that Coyne should bear all the risk of a final loss, to have provided in plain terms that he should repay all of their disbursements
265 as well as their commission. The fact that provision is made for the order in which the two funds, to be received through government payments, are to be applied by appellants is inconsistent with the contention that the price to be paid them as subcontractors was to be the full cost of the work. If that was so, why was Coyne interested in the order in which the assigned funds should be paid out by them? But if the agreement was that Hardaway & Prowell should take the risk and complete the work, using Coyne's plant and quarry for the money to be earned by so doing, but with the right to also call upon the reserved $8,300.00, in the contingency that the work should cost more than that part of the contract price to be earned by the completion, we can see some reason for providing that if the second fund is called upon, that debts incurred for labor and materials shall be first paid. Such claims, as suggested heretofore, might be asserted as liabilities against the contractor's bond, and if paid by the surety, would be debts for which Coyne would be liable over.

Another consideration leading to the same interpretation is found in the fact that the contract provides that the work was to be completed upon the terms and stipulations recited. One of the considerations named is, that appellants are to have the use of Coyne's plant and quarry free of expense. 2d. That he is to receive the money already earned and to be earned, only the surplus of first named fund to be paid over to Coyne in the event these funds prove more than sufficient to repay them for every kind of disbursement and also a profit of 15 per cent. In one contingency only is there any provision for any payment to be made *to* Coyne to them, except to the extent of the two funds mentioned, and that is in the event appellants shall cancel the contract for a breach by him in respect to the assignment of the two funds out of which they were to pay themselves.

If, therefore, they are to be regarded as subcontractors, they are only such for a fixed price, being the two funds earned by completion and the free use of Coyne's plant. If they suffered
266 unexpected losses they must bear them. The price for which they agreed to do the work has been paid them, and they

may not recover against the surety what they could not recover against the principal obligor. It was a speculative contract upon their side. They believed they could see their way through and realize a handsome commission. They took their chances and selected their own mode of payment.

The decree disaffirming their claims must be affirmed.

267 And afterwards, to-wit: but on the same day a petition for appeal was filed in said cause clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

In Equity. No. 1584.

B. H. HARDAWAY and R. P. PROWELL, Appellants,
vs.
NATIONAL SURETY COMPANY, Appellee.

Petition for Appeal.

The appellants, B. H. Hardaway and R. P. Prowell, respectfully show that the above entitled cause is pending in the United States Circuit Court of Appeals for the Sixth Circuit; that a judgment has therein been rendered on the 8th day of January, A. D. 1907, affirming the decree of the Circuit Court of the United States for the Western District of Kentucky, Sixth Circuit, and that the matter in controversy in said suit exceeds one thousand dollars besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Sixth Circuit has not final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal—there being involved therein a controversy arising under the constitution or laws of the United States, to-wit:

268 a controversy arising under an Act of Congress of the United States, approved August 13th, 1894, entitled "An Act for the Protection of Persons furnishing material and labor for the Construction of Public Works."

Wherefore, the appellants pray that an appeal to the Supreme Court of the United States be allowed them, directing the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause, with all things *covering* the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the appellants may be reviewed and, if error be found, corrected according to the laws and customs of the United States.

TEMPLE BODLEY,
JOHN B. BASKIN,
J. MANLY FOSTER,
W. B. OLIVER,
Counsel for Appellants.

Allowed, March 5, 1907.
HORACE H. LURTON,
Presiding Circuit Judge.

And afterwards, to-wit: on the 31st day of January A. D. 1907 a petition for rehearing was filed in said cause clothed in the words and figures following, to-wit:

269 United States Circuit Court of Appeals for the Sixth Circuit.

No. 1584.

B. H. HARDAWAY and R. P. PROWELL, Partners as Hardaway & Prowell, Appellants,
vs.
NATIONAL SURETY COMPANY, Appellee.

Petition for Rehearing.

The appellants, B. H. Hardaway and R. P. Prowell, partners as Hardaway & Prowell, without waiving but expressly reserving their right to pray an appeal to the supreme court, or to apply to the supreme court, for a writ of *certiorari*, respectfully petition the court for a rehearing in this cause.

In the opinion, this court holds that appellants were, in effect, but lenders of the money to the amount of their claim. The order of reference permitted claimants to make proof of their claims by affidavits (Record, p. 15). R. P. Prowell testified that all the items claimed for were actually used in said work (Record, p. 103).

The supreme court has decided that lending money is not furnishing labor and materials, but we submit that the same case which decided that held that, where money is loaned for the procurement of labor and materials and was used for that purpose, it is the same as if the labor and materials had been directly procured by the party who furnished the money.

Prairie State Bank *v.* U. S., 164 U. S., 227.

The Circuit Court of Appeals for the Ninth Circuit in Henningsen *v.* U. S. F. & G. Co., 143 Fed., 812, declared the same doctrine. Therefore, we contend that if the transaction amounted to an ad-
270 vancement or loan of money by Hardaway & Prowell, they are, nevertheless, entitled to recover, because, if it were a loan, it was for the procurement of labor and materials and was actually used for that purpose.

This court, however, further holds:

"If, therefore, they (appellants) are to be regarded as sub-contractors, they are only such for a fixed price, being the two funds earned by completion and the free use of Coyne's plant."

Appellants were awarded only one of those funds. This second fund was described in the contract as about $8,300. It was in fact $8,176.75 and was paid into court May 31, 1903. The decree allowed claims of thirteen other parties amounting to $13,261.76, which sum the surety company was directed to pay in pursuance of the agreed order of reference, less the aforesaid sum, in court (Decree, Record, p. 215). This decree was in accord with the directions in the opinion of the circuit Judge (Record, p. 232).

By the contract between appellants and Coyne (Record, p. 219, etc.), this fund in court was assigned to appellants

"for the completion of said work and for securing to said Hardaway & Prowell all amounts that they shall have to pay on whatever account for the completion of said lock and dam."

We admit, under the authority of Prairie State Bank *v.* U. S., 164 U. S., 227, that Coyne could not assign any part of this fund to Hardaway & Prowell, or to any one else, except for labor and materials. If the fund had been in Coyne's possession, he could have used it for the purchase of labor and materials. We perceive no difference between his assigning it, though not in hand, for labor and materials and his expending it, when in hand, for labor and materials. The surety is in no way prejudiced by this assign-

271 ment. The surety was liable for all labor and materials furnished and that liability was not increased by one dollar on account of this assignment. Appellants still owe about $24,000 for labor and materials used in this work.

In holding that appellants undertook to finish this work for the two funds, to-wit, the checks of the Government paid monthly and the fund reserved by the Government, we suggest that the court overlooked two provisions:

First, that Hardaway & Prowell were limited to a profit of 15 per cent., and,

Second, that the assignment of the fund in court expressly declares that it was made "for securing to the said Hardaway & Prowell all amounts that they shall have to pay on whatever account for the completion of said lock and dam," etc.

If it was intended that these funds should constitute the contract price, there would have been no limitation of 15 per cent. to Hardaway & Prowell, nor would there have been inserted the recital that this fund was assigned as security for the amounts which Hardaway & Prowell might expend for the work. We contend that these funds were simply assigned as some security and, where they prove insufficient, the law gives the recourse for the deficit, unless it affirmatively appears that the assignees of the funds agreed to surrender their recourse on the assignor Coyne.

Wherefore, we respectfully submit:

First, that appellants were not lenders of money, but furnished labor and materials which were used for the construction of the work; and,

Second, that the decree deprived them of $8,176.75, the fund in court, since the entry of the decree on May 15, 1906, so that, in any event, the decree should have been reversed, with directions to require the appellee to pay the sum of $8,176.75, with 8 per cent. interest thereon from May 15, 1906.

272 The appellants respectfully pray for a rehearing of this cause.

B. H. HARDAWAY AND
R. P. PROWELL,
Partners as Hardaway & Prowell,
By BODLEY & BASKIN,
FOSTER & OLIVER,
Counsel for Appellants.

Certificate.

John B. Baskin certifies that he has, from the inception of this cause, been of counsel for the appellants, B. H. Hardaway and R. P. Prowell, partners as Hardaway & Prowell, in the Circuit Court for the Western District of Kentucky and also in this court, and that, in his opinion, this petition is well-founded in point of law, and he further certifies that it is not filed or interposed for delay.

JOHN B. BASKIN.

273 And afterwards, to-wit: on 5th day of March, A. D. 1907 an order was entered upon the journal of said court clothed in the words and figures following, to-wit:

Journal C, p. 375.

No. 1584.

HARDAWAY & PROWELL
vs.
NATIONAL SURETY CO.

The petition to rehear filed in this cause is denied.

And afterwards, to-wit: but on the same day, an assignment of errors was filed in said cause clothed in the words and figures following, to-wit:

United States Circuit Court of appeals for the Sixth Circuit.

In Equity. No. 1584.

B. H. HARDAWAY and R. P. PROWELL, Appellants,
vs.
NATIONAL SURETY COMPANY, Appellee.

Assignment of Errors.

And now, on the — day of January, A. D. 1907, came the Appellants, B. H. Hardaway and R. P. Prowell, by Temple Bodley and John B. Baskin, their solicitors, and say that the judgment in said cause, entered in the United States Circuit Court of Appeals for the Sixth Circuit on the 8th day of January, A. D. 1907, is erro-
274 neous and against the just rights of said appellants for the following reasons:

First. Because the United States Circuit Court of Appeals for the Sixth Circuit erred in entering a judgment, decree and order, affirming the decree of the United States Circuit Court for the Western District of Kentucky, Sixth Circuit, (which decree was entered on the 15th day of May, 1906) and adjudging that appellee recover

of appellants its costs expended in the cause in said United States Circuit Court of Appeals for the Sixth Circuit.

Second. Because the United States Circuit Court of Appeals for the Sixth Circuit did not adjudge that appellants supplied labor and material of the value of Thirty-two Thousand, Seven Hundred and Fifty-seven & 34/100 Dollars ($32,757.34) to Joseph Coyne in the construction of Lock and Dam Number 4 in the Black Warrior River in the State of Alabama, pursuant to a contract dated September 28th, 1899, between Major Wm. T. Rossell, Corps of Engineers United States Army, of the first part, and James E. Willard, Charles L. Cornwell and Joseph Coyne, partners composing the firm of Willard & Cornwell, of Louisville, Jefferson County, Kentucky, of the second part.

Third. Because said United States Circuit Court of Appeals for the Sixth Circuit did not adjudge that said Joseph Coyne wholly failed to pay to appellants said sum of $32,757.34.

275 Fourth. Because said Court did not enter a judgment, reversing said decree entered by the United States Circuit Court for the Western District of Kentucky, wherein it is adjudged and decreed that said claim of appellants be disallowed and dismissed and that appellants shall take nothing by or upon their said claim against said National Surety Company.

Fifth. Because said United States Circuit Court of Appeals for the Sixth Circuit did not enter a judgment ordering and directing said United States Circuit Court for the Western District of Kentucky to set aside said decree entered therein on May 15th, 1906.

Sixth. Because said United States Circuit Court of Appeals for the Sixth Circuit did not enter a judgment ordering and commanding said United States Circuit Court for the Western District of Kentucky to enter a decree, confirming the report of the Special Master and adjudging and decreeing that appellants shall recover of said National Surety Company the said sum of Thirty-two Thousand, Seven Hundred and Fifty-seven & 34/100 Dollars ($32,757.34), with interest thereon at the rate of eight per cent. per annum from March 1st, 1906 until paid, together with their costs expended in said cause in the United States Circuit Court of Appeals for the Sixth Circuit.

276 Seventh. Because said Court erred in its opinion in holding that there was no agreement that appellants should supply the necessary labor and materials to finish said lock and dam.

Eighth. Because said Court erred in said opinion in holding that appellants were in substance lenders of money to Joseph Coyne.

Ninth. Because said Court erred in said opinion in holding that appellants agreed to complete said work for that part of the original contract price which would be earned by so doing.

Tenth. Because said Court erred in said opinion in holding that, if appellants be regarded as subcontractors, they were only such for a fixed price, being the funds earned by completion of the work and the free use of said Coyne's plant.

Eleventh. Because said Court erred in said opinion in holding that appellants were paid the price for which they agreed to do said work.

Twelfth. Because said Court did not enter a judgment ordering and commanding said United States Circuit Court for the Western District of Kentucky to enter a decree adjudging that the sum of $8176.75, paid into court on May 31st, 1903, should be allowed and paid to appellants by reason of the assignment to them of said fund by Joseph Coyne in the written contract dated June 2nd,
277 1901, and set forth on pages 218, 219, 220 and 221 of the printed record in said United States Circuit Court of Appeals for the Sixth Circuit.

TEMPLE BODLEY,
JOHN B. BASKIN,
Counsel for Appellants.

And afterwards, to-wit: but on the same day a bond was filed in said cause clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1584.

B. H. HARDAWAY and R. P. PROWELL, Doing Business as Hardaway & Prowell,

vs.

NATIONAL SURETY COMPANY.

Know all men by these presents:—That B. H. Hardaway and R. P. Prowell, doing business as Hardaway & Prowell, as principals, and John B. Baskin, as surety, are held and firmly bound unto the National Surety Company, appellee in case No. 1584 in the United States Circuit Court of Appeals for the Sixth Circuit, their successors and assigns, in the sum of Five hundred ($500.00) Dollars; for the payment thereof well and truly to be made they bind themselves, their successors executors and administrators, jointly and severally by these presents.

278 Done this 18th day of January, A. D. 1907.

Whereas, the above-named B. H. Hardaway and R. P. Prowell, doing business as Hardaway & Prowell, hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered by said United States Circuit Court of Appeals for the Sixth Circuit in the above-entitled case:

Now, therefore, the condition of this obligation is such that if the said appellants, B. H. Hardaway and R. P. Prowell, doing business as Hardaway & Prowell, shall prosecute said appeal to effect and answer all costs if they shall fail to make good their plea, then this

obligation shall be void, otherwise the same shall be and remain in full force and virtue.

B. H. HARDAWAY, [L. S.]
R. P. PROWELL, [L. S.]
Doing Business as Hardaway & Prowell,
By JOHN B. BASKIN, *Attorney.*
JOHN B. BASKIN. [L. S.]

This bond consented to
W. W. WATTS,
Counsel for National Surety Company, Appellee.

Approved and accepted this March 5th 1907.
HORACE H. LURTON,
Sr. Circuit Judge.

And afterwards, to-wit: but on the same day a citation was issued in said cause clothed in the words and figures following, to-wit:

279 *Citation.*

Case No. 1584.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the National Surety Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the Capitol, in the City of Washington, District of Columbia, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein B. H. Hardaway and R. P. Prowell, doing business as Hardaway & Prowell are appellants, and you are appellee, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 5th day of March, A. D. 1907, and of the Independence of the United States one hundred and thirty-first.

(Signed) HORACE H. LURTON,
Presiding Judge of the United States Circuit Court of Appeals for the Sixth Circuit.
—— ——, *Clerk.*

280 Service of the foregoing citation accepted.
(Signed) WILLIAM W. WATTS,
HENRY FITTS,
Counsel for National Surety Co.

Citation filed March 5, 1907.

And on a day following, to-wit: on the 9th day of March, A. D. 1907 an opinion on rehearing was filed in said cause clothed in the words and figures following, to-wit:

281

No. 1584.

United States Circuit Court of Appeals, Sixth Circuit.

HARDAWAY & PROWELL
v.
NATIONAL SURETY CO.

Appeal from the United States Circuit Court for the Western District of Kentucky.

Decided March 5, 1907.

Before Lurton, Severens and Richards, Circuit Judges.

On Petition for Rehearing.

LURTON, Circuit Judge, delivered the opinion of the court:

A petition to rehear has been filed. We rested our decision affirming the decree below upon the ground that Hardaway & Prowell were not subcontractors at all. But upon the assumption that they could be so considered we said: "they are only such for a fixed price, being the two funds earned by completion and the free use of Coyne's plant. If they suffered unexpected losses they must bear them. The price for which they agreed to do the work has been paid them, and they may not recover against the surety what they could not recover against the principal obligor."

It is now said, that one of the funds to be paid them upon the theory that they were contractors for a fixed price, namely the retained percentages for work done before Hardaway & Prowell
282 became connected with the contract, has not, in fact, been paid to them. That this fund was paid into the court below and is there to-day, and that in any view of the case ought to be paid to Hardaway & Prowell by virtue of the assignment to them by the contractors. No error was assigned in respect of this and no attention called to the disposition of that fund by brief or otherwise. We, therefore, inadvertently and erroneously stated that Hardaway & Prowell had received the price for which they agreed to do the work, upon the theory that they were contractors.

The Court below in respect of this fund said:

"This fund, as before indicated, is $8176.75. It is made up of certain percentages withheld by the Government from time to time out of what would otherwise been due under the contract. It appears from the record that the whole sum was reserved upon the estimates for work done previous to June 2, 1903, and consequently the surety is entitled to the full benefit of this fund, though Hardaway &

Prowell, in my judgment, would have been entitled to any reservation in respect to the work done after June 2, 1903. Section 3468, Revised Statutes of the United States, respecting the rights of sureties may also support this conclusion of the court, even if the facts in the record do not otherwise make it clear.

It results that the complainant is liable for $13,261.76 on the claims of Classes 1 and 2. This sum includes of course the $8,176.75 the fund in court. The difference, namely, $5,085.01, and the costs of this action, should be paid into the court by it.

This is manifestly correct. The surety company's equity of subrogation is antecedent to any claim arising under the mere equitable assignment under which Hardaway and Prowell claim. Prairie State Bank *v.* United States, 164 U. S. 227; First Nat'l Bank *v.* City Trust Bank, 114 F. R. 529; Reid *v.* Pauly, 212 F. R. 652; Henningsen *v.* United States etc. Co., 143 F. R. 810. The application of that fund to the payment of claims for material and labor accruing before the assignment to Hardaway and Prowell is something of which Hardaway and Prowell cannot justly complain in as much as any right of assignment is subordinate to the equity
283 of the surety company to have the fund applied so as to relieve their liability. The right to go upon the surety company to the extent that such application leaves them unpaid could only arise if Hardaway and Prowell were subcontractors. That we held they were not. In that part of the opinion above set out we only undertook to state their utmost right if they should be so held.

Rehearing denied.

284 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Hardaway & Prowell *vs.* National Surety Company No. 1584, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 9th day of March A. D. 1907.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

285 Supreme Court of the United States.

B. H. HARDAWAY and R. P. PROWELL, Doing Business as Hardaway & Prowell, Appellants,
vs.
NATIONAL SURETY COMPANY, Appellee.

Stipulation.

It is stipulated that the following parts of the printed record, which was filed on September 26th, 1906 in the United States Circuit Court of Appeals for the Sixth Circuit and which is now a part of the record in the Supreme Court, may not be printed in the Supreme Court, to wit:

1. The title page.
2. Index pages III and IV.
3. The stipulation on pages 1 and 2.
4. It is stipulated that beginning on page 17 with the words, "June 1903," and down to the word, "Summary," on page 26 and beginning with the words, "June 1, 1903" on page 84 and ending on page 102 down to the word, "Summary" of said printed record is a list of all alleged materials claimed to have been furnished by appellants to Joseph Coyne in the construction of lock and dam No. 4 in the Black Warrior River, State of Alabama, in pursuance of a contract of June 2nd, 1903. Said pages give the items of materials claimed to have been furnished with the dates, amounts and prices thereof and aggregate $10,312.28. The foregoing may not be printed in the Supreme Court.
5. It is stipulated that the items beginning with the last eleven lines on page 29 of said printed record and ending at the
286 bottom of page 35, being items which the Special Master rejected, may not be printed in the Supreme Court.
6. It is stipulated that pages 36 to 84, both inclusive, of said printed record contain appellants' claim for labor alleged to have been supplied to Joseph Coyne in the construction of said Lock and Dam No. 4, in pursuance of said contract of June 2nd, 1903; that said pages give the alleged names of the laborers, the alleged number of days and hours they worked and the alleged amounts they earned, beginning with June 1903 and ending with December 1904, and alleged to aggregate $40,061.11. Said pages may not be printed in the Supreme Court.
7. It is stipulated that so much of the deposition of R. P. Prowell as begins with the eleventh line from the bottom on page 133 and continues through the eighteenth line from the top of page 137 relates only to the identification of certain checks as used in purchasing supplies for commissary at the scene of the contract work, and may not be printed in the Supreme Court.
8. It is stipulated that the stipulation on page 139 of the printed record may not be printed.

9. It is stipulated that so much of the deposition of R. P. Prowell, as begins with the tenth line from the top on page 149 and goes through the fourteenth line from the top on page 151 of the printed record, relates exclusively to the several wages paid to different laborers and classes of laborers and may not be printed in the Supreme Court.

10. It is also stipulated that of appellee's exceptions to the report of the Special Master the last eight lines on page 185 and all of pages 186 and 187 and so much thereof as appears at the top of page
287 188 (except the signatures of solicitors) of the printed record may not be printed in the Supreme Court.

11. It is also stipulated that appellants' exceptions to the Special Master's report, beginning on page 188 and ending on page 193 of the printed record, may not be printed in the Supreme Court.

12. It is also stipulated that appellee's amended and additional exceptions, as they appear on pages 193 to 213 inclusive, may not be printed in the Supreme Court.

13. It is also stipulated that assignment of error "20," filed by appellant on the appeal to the United States Circuit Court of Appeals on pages 236, 237, 238, also the appeal bond given in the Circuit Court on pages 238 and 239 of the printed record, also stipulation on page 239, may not be printed in the Supreme Court.

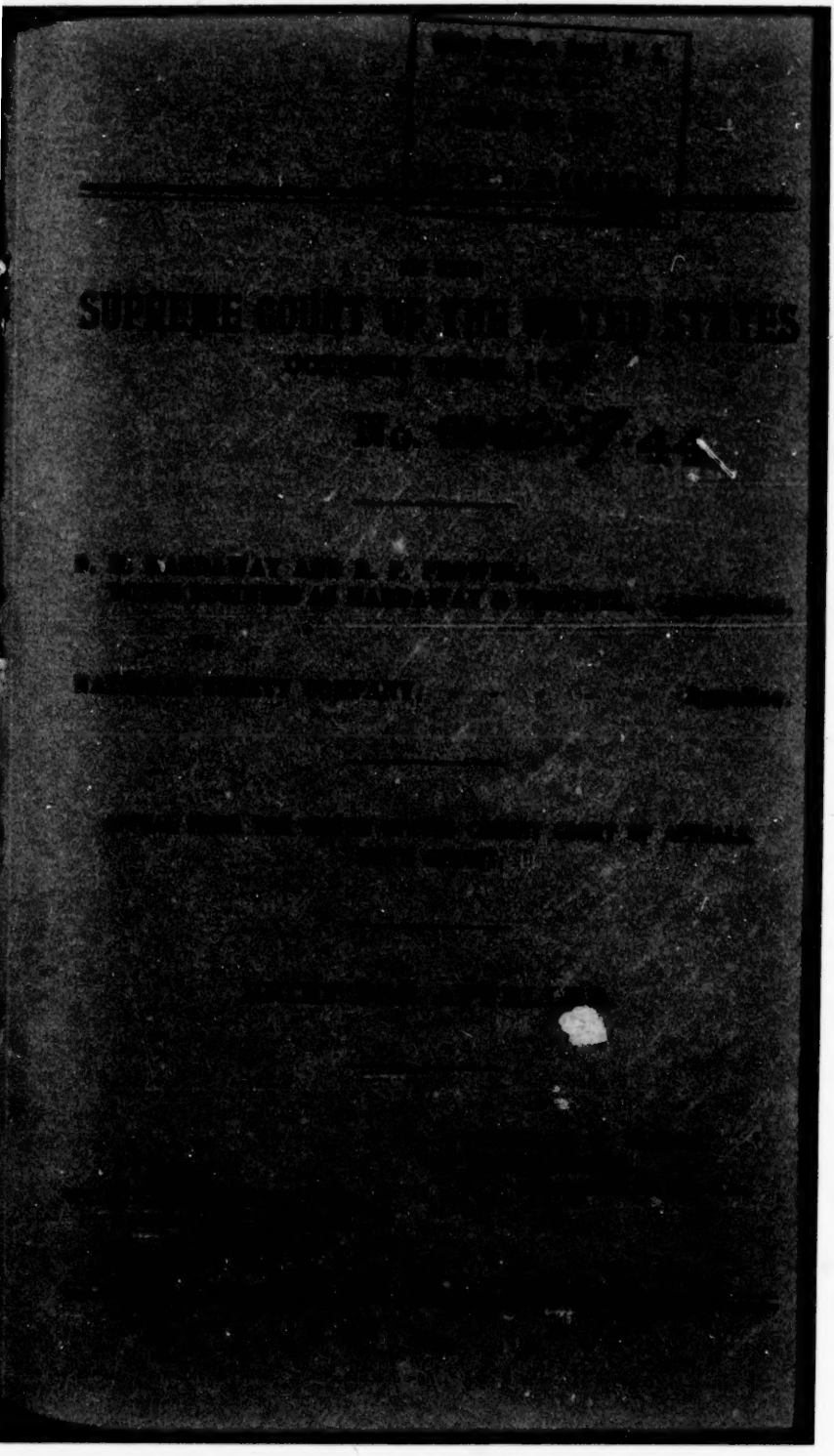
14. It is also stipulated that the citation, appeal bond, and orders filing petition for appeal, granting appeal, filing assignments of errors and citation and approving same—all entered in the said United States Circuit Court of Appeals—may not be printed in the Supreme Court.

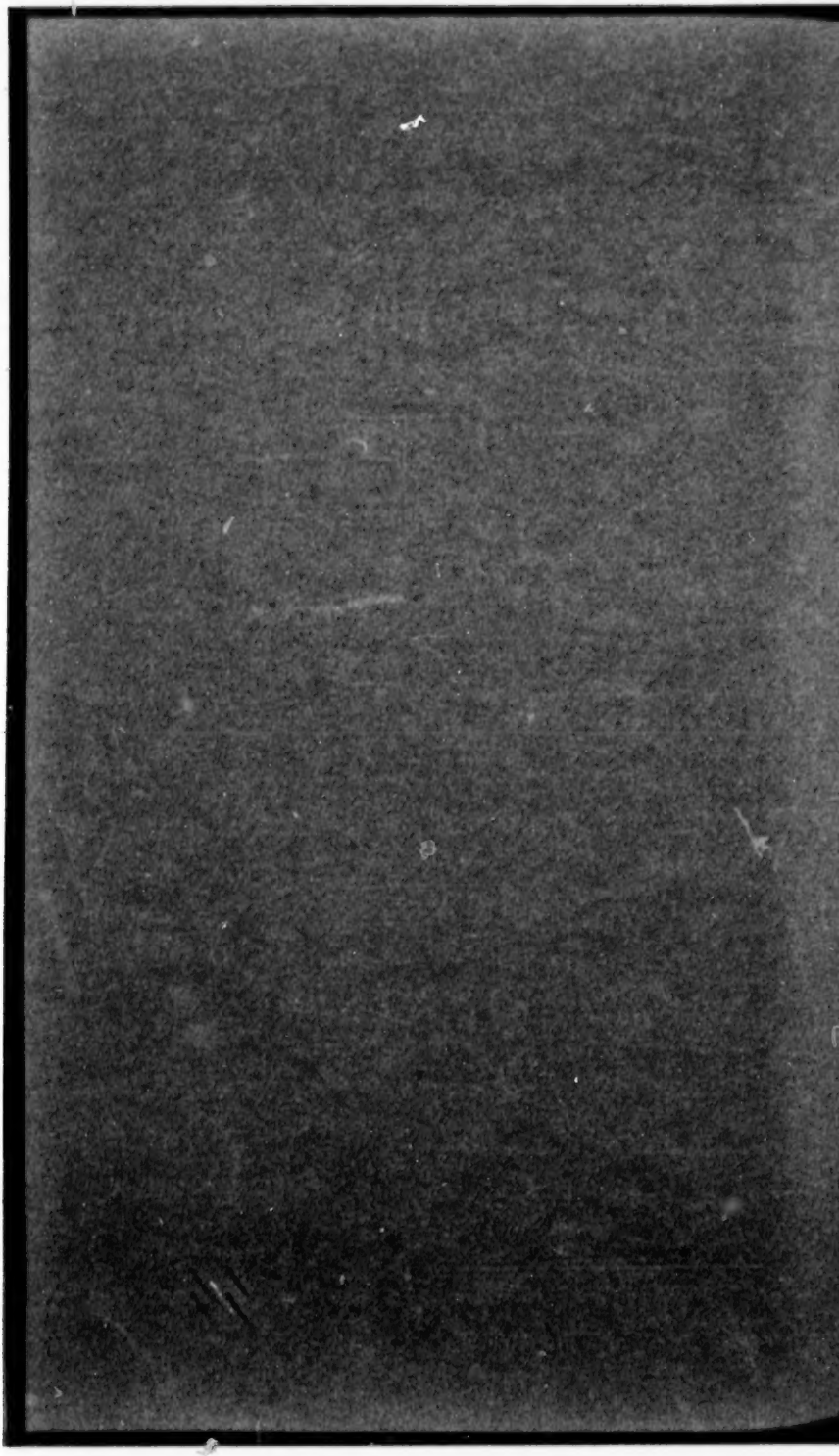
15. It is also stipulated that all portions of the record, as are not herein expressly eliminated, shall be printed in the Supreme Court.

TEMPLE BODLEY,
Solicitor for Appellants.
WILLIAM W. WATTS,
Solicitor for Appellee.

[Endorsed:] 654, 20619. Bodley & Baskin, Attorneys.
288 [Endorsed:] File No. 20619. Supreme Court U. S. October Term, 1906. Term No. 654. B. H. Hardaway *et al.*, Appellants, *vs.* National Surety Co. Stipulation to omit parts of record in printing. Filed April 22, 1907.

Endorsed on cover: File No. 20,619. U. S. circuit court appeals, 6th circuit. Term No. 654. B. H. Hardaway and R. P. Prowell, doing business as Hardaway & Prowell, appellants, *vs.* National Surety Company. Filed March 16th, 1907. File No. 20,619.





Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 654.

B. H. HARDAWAY AND R. P. PROWELL, DOING BUSINESS AS HARDAWAY & PROWELL, - *Appellants,*

vs.

NATIONAL SURETY COMPANY, - - - - - *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLEE.

Here is the case of a surety to a co-partnership of three men, which surety obligated itself under the Federal statute to see to it that all persons supplying labor or material to its principals, for the Government work, should be paid therefor, now called upon to pay a claim of about $31,000.00 to certain claimants previously unknown to it, and to whom the principals are in no wise liable. These claimants had expressly agreed never to look to two of the principals for payment of any part of the claim, and had, if not by express agreement by irresistible implication, made an equally binding release

of the third and only remaining principal. In the progress of the transaction two of the principals transferred all their interest in the contract to the third, who agreed to relieve the retiring partners of all further liability in respect to the job. Of this the surety was kept in ignorance. Thereafter, that third partner broke and transferred his interest to certain third parties, entire strangers to the surety. Of this transfer the surety was uninformed. These third parties, taking the unfinished work in the hope of large profits, arranged for the immunity of the principals from all liability to them; carried on the work for some eighteen months at an alleged loss of about $40,000; and then, for the first time, making themselves and their relation to the work known to the surety, demanded that the surety reimburse them for the loss sustained. All persons from whom these third parties procured either labor or material have been paid in full. It is now contended that this claim is supported by the opinion of Mr. Justice Day in the case of Hill v. American Surety Company, 200 U. S. 197. That opinion was handed down just before the hearing of this case on exceptions to the Master's report before His Honor, Judge Evans, on Circuit. Although the vast difference between the facts of that case and of this are manifest, that opinion seems to be the main reliance of appellants upon this appeal. Both courts below, in their opinions, find the case at bar unlike that with which Mr. Justice Day was dealing. Both courts yield unhesitating assent to the authority of the Hill case, but find it without application here.

The case is here on appeal from the decree based on the opinion of His Honor, Judge Evans, as affirmed in two opinions rendered by His Honor, Judge Lurton, of the Sixth Circuit Court of Appeals. The only question presented is that of allowance or disallowance of appellants' claim. In spite of this singleness of issue, appellants have seen fit to present five specifications of

error; three of which go to the reasoning adopted by the Circuit Court of Appeals, rather than to the judgment rendered.

The facts follow:

STATEMENT OF FACTS.

On September 28, 1899, a contract for the construction of a lock and dam in the Black Warrior River, near Tuscaloosa, Alabama, was entered into between the United States and Willard & Cornwell, a co-partnership, consisting of J. E. Willard, Charles L. Cornwell and Joseph Coyne (R. 19). Contemporaneously, Willard & Cornwell entered into a bond with appellee as surety, conditioned for the faithful performance of said contract, and also conditioned, as required by Act of Congress of August 13, 1894, 28 Stat. L. 278, 6 Fed. Stat. Ann. 125, as follows: "And shall promptly make full payments to all persons supplying them labor or material in the prosecution of the work provided for in said contract." (R. 9.)

Upon February 5, 1901, J. E. Willard and Charles L. Cornwell, of the one part, and Joseph Coyne, of the other part, dissolved said firm and entered into a contract, of which the following is an epitome:

The co-partnership is dissolved. Coyne is to continue the work and have all profits thereafter accruing from the Government contract, is to pay all outstanding debts, and agrees "that all future purchases for said lock and dam No. 4 are to be made in the name of Joseph Coyne alone." Coyne is made the attorney in fact for the defunct firm to collect Government checks to be issued on the contract work; and he purchases the tools and machinery of the firm, giving his notes for $4,400, secured by lien thereon, to J. E. Willard and Charles L. Cornwell, the other two members. (R. 89-90.)

This paper became a matter of public record at Tuscaloosa three days after its execution. Prowell, one of the appellant firm, became acquainted with its contents at or about that time. (R. 32.)

From the date of that contract until June 2, 1903, Coyne, so far as everyone but the Government was concerned, carried on the work in his individual name and upon his individual responsibility. During all this time Prowell traded with Coyne as an individual extensively and was in every respect informed of his exact relation to the old Willard & Cornwell firm. (R. 33.)

By the spring of 1903, Coyne was in debt far beyond his ability to pay, and his largest creditor was Allen & Jemison Company, hardware dealers, of which Prowell, one of the appellants, was a stockholder and director and a chief salesman. (R. 31.) Growing out of Prowell's persistent demand for a reduction of Coyne's indebtedness to the Allen & Jemison Company, a contract was made between Coyne of the one part and Hardaway & Prowell of the other part, which may be summarized as follows (R. 90-1-2):

It begins with a reference to the original contract between Willard & Cornwell and the United States. Next follows: "And whereas, shortly after the beginning of the work upon said lock, the said Joseph Coyne, by an arrangement between him and his co-partners, undertook to complete and finish said lock * * * and in consideration of such undertaking, acquired the beneficial interest of said firm in said contract, and was to receive all amounts paid by the United States in consideration of said contract, and whereas said lock is still uncompleted, and the said Joseph Coyne can not, on account of his inability to procure necessary financial aid, and on account of the disorganization of his labor forces, and various and sundry other reasons, complete and finish said work," etc. It then recites that $8,300 of retained percentages are at that time in the keeping

of the United States, and that Coyne is in danger of losing both profits to be made by completing the work and said retained percentages. Hardaway & Prowell then agree to superintend and "to furnish the necessary finances for the completion" of the work for an agreed compensation of fifteen per cent. upon the total cost of completing it. Coyne agrees to turn over to Hardaway & Prowell entire charge of the work, and the entire outfit of machinery and tools, and to indorse all Government checks to them. Provision is made for the preferential disbursement of all money received from the United States, including retained percentages. It is provided that if Coyne fails to so arrange the Government checks and endorsement thereof as to enable Hardaway & Prowell to collect them, that then Hardaway & Prowell may annul the contract, and "in said event," and in that event only, "the said Hardaway & Prowell shall have a claim against the said Joseph Coyne for all money furnished by them upon any account whatsoever in the prosecution of said work and which shall not have been repaid to them, and for all compensation earned under this contract and not paid to them, and such claim shall be due and payable at once upon their termination of the contract."

Under this contract Hardaway & Prowell completed the work and claim to have expended the amount of their claim in excess of the periodical estimates collected from the Government.

The contract of co-partnership between Hardaway and Prowell was made for the sole purpose of the trade with Coyne, and provided that they should divide the profits and losses of that undertaking equally. (R. 31, 33.)

Every particle of the labor employed by Hardaway & Prowell was paid for in full and approximately at the time it was contracted to be paid for. (R. 35.)

All material purchased by Hardaway & Prowell, except a certain account which that firm still owes to Allen

& Jemison Company, of which Prowell is stockholder, director and chief salesman (R. 31), and a few other insignificant amounts, have been paid for in full. No one of those persons appear as claimants in this suit. (R. 37.)

Neither Hardaway & Prowell, Joseph Coyne nor Willard & Cornwell ever notified the Surety Company that there had been a change in the management of the work, but Hardaway & Prowell went ahead with it upon their own account, wholly without consultation with the surety. (R. 28.) The surety only learned of appellants' connection with the work late in 1904 (R. 99), immediately before the original bill was filed; and only became acquainted with the purport of aforementioned contracts after the filing of the bill. (R. 77.)

Upon discovery that there had been some change, but without knowing just what that change was, and fearful that it might be put to great loss and the percentages retained by the Government might be dissipated, the National Surety Company filed its bill in the Circuit Court of the United States for the Western District of Kentucky, alleging in substance the various matters above mentioned, seeking the appointment of a receiver and an injunction against the various defendants from collecting the moneys coming from the Government. (R. 1.)

As a result of the filing of the original bill an injunction was granted, but by agreed order (R. 12), the retained percentages, amounting to $8,176.75, were paid into the Circuit Court, and by an agreed order of reference all alleged claims against the surety were filed with a Special Master for allowance or disallowance. These claims fell into three categories:

(1) One claim for stone supplied to Willard, Cornwell & Coyne prior to the contract of February 5, 1901, dissolving that firm. The allowance of this was conceded by the surety.

(2) Thirteen claims amounting to some $13,000 for material and labor supplied to Joseph Coyne between the date of his contract with Willard & Cornwell and the date of his contract with Hardaway & Prowell. These claims were allowed by the Special Master, and his finding was sustained by the lower court against the most earnest insistence of the surety. But none of these claims are brought up by this appeal.

(3) The Hardaway & Prowell claim, which stands alone on this appeal, is the only claim accruing subsequent to the date of their contract with Joseph Coyne. This claim was allowed by the Special Master, but disallowed by the Circuit Court. Thereupon the case was appealed to the Circuit Court of Appeals, Sixth Circuit, where the lower court was affirmed. A petition for rehearing being filed and denied, the case was brought here on appeal by Hardaway & Prowell on their claim alone. (Circuit Court opinion, R. 88-103. Circuit Court of Appeals' original opinion, R. 122-130, and on petition for rehearing, R. 137-8.)

BRIEF OF THE ARGUMENT.

In this condition of things we are led to ask: Did Hardaway & Prowell contract with or without reference to the surety? If they were to rely on the surety they should have notified it so that its rights might be exercised or waived. No such notice was given. If they did not rely on the surety at the time, it is too late for them to do so after the work was finished and alleged losses made. A reading of their contract shows conclusively that it was believed that there was a profit in the job, and the subsequent action of Hardaway & Prowell indicates very clearly that they were satisfied to look to the job alone and not to the principal or his or their surety.

There are two cases which appellants' counsel rely upon as sustaining their view of this matter. They are:

Hill v. American Surety Co., 200 U. S. 197.
Tennis v. Wetzel, 140 Fed. 194; affirmed, 145 Fed. 458.

It may possibly be that if neither had been decided we would not now be in this court. We will first take up Mr. Justice Day's opinion in the case of the United States for the use of Hill v. American Surety Company.

HILL v. AMERICAN SURETY COMPANY.

The opinion in that case and the principles thereunder were given full weight in the consideration of this case by both the trial judge and the Circuit Court of Appeals. His Honor, Judge Evans, most carefully considered the facts there and here. He differentiated them, finding them unlike. He found none of the features of this case in that. That was a plain case without the complications of this. He relied upon other decisions of this court on the question of suretyship; took the position that the facts of this case could not be covered by any general expressions in that case, and pointing out that this court had repeatedly decided that general expressions must be limited to the case in hand, said (R. middle page 101):

> "It may be proper to say, that probably no court has more often reminded the Bar, that general possessions (expressions) in an opinion of the court must be limited to the case in hand than has the Supreme Court of the United States, and I see nothing in the facts in the case of the United States v. American Surety Co. which seems to me fairly to control this phase of this case."

It must not be overlooked that by virtue of the contracts, Hardaway & Prowell could not call upon Willard, Cornwell or Coyne for a dollar of any labor, material, profit or loss in the work. They took the work *cum onere*. If profitable, well and good. Otherwise they had no one to look to. So far as the principals to the Government contract were concerned, they stepped down and out. Yet Hardaway & Prowell taking the shoes of those principals propose here to hold the surety.

On this subject, in order to more forcefully present the argument, we quote Judge Evans further (R. bottom page 100):

> "In the opening sentence in its opinion in United States v. Allsbury, 4 Wallace (71 U. S.), 186, the Supreme Court said: 'It is unnecessary to refer to authorities to show that the liability of the surety can not exceed that of his principal.' In the case before us no member of the firm of Willard & Cornwell is in any wise bound to Hardaway & Prowell for any part of the demand claimed, and yet it is sought to hold the surety on the penal bond for this claim, although the principals on that bond are manifestly not bound for it, and who, if ever bound, were released by the contract itself. Not only is the principal in the bond released from liability for this claim, if any liability ever existed under the contract of June 2, 1903, but the contention here would extend the liability of the surety entirely beyond any possible liability of his principal, thus in effect making the surety the principal and the only debtor to Hardaway & Prowell."

When the surety company signed the bond it never agreed to make good any loss on the job to its principal, Willard & Cornwell, or to guarantee them any profit. When Hardaway & Prowell slipped into the shoes of

Willard & Cornwell it was agreed that they should have a profit of fifteen per cent. before Coyne could get anything. Coyne was not to pay them that money but they were to make it out of the job, holding Coyne harmless if he but endorsed the Government checks, gave them his plant, etc. (Contract, R. 91-2.) Notwithstanding all this, Hardaway & Prowell, who undertook to finance the job, now say in effect, "Though we are in the stead of Willard, Cornwell and Coyne, you, as surety, must pay us those finances and our profit besides." Looking to this proposition, the want of notice to the surety, the non-contemplation of such a change as did take place, and "the reckless disregard" of the surety's rights, Judge Evans further differentiates by saying (R. p. 101):

> "Upon these grounds it will require a more licentious construction of the penal bond executed in this case than I am willing to give to it to hold an outside party liable for the debt these claimants owe themselves for the labor and material supplied to themselves in a venture in which they embarked with the expectation of making a profit for themselves and for that purpose alone. It seems to me clear that the surety in the penal bond never agreed that that profit, if any, should be made out of it, nor that any loss would be paid by it, and while in an appropriate case we might fairly construe the bond to include a sub-contractor in the proper sense of that term as having been originally within the contemplation of the parties, we can not imagine that such an arrangement as that made between the parties to the contract of June 2, 1903, was within the contemplation of the surety when it signed the penal bond. * * * But I do note in the opinion in that case (the Hill case) a suggestion that upon the facts there shown the court could not see how the surety on the bond could be injured. That remark certainly could

not be applied to this case, for if this surety was ever thought of before the ultimate losses developed, (which may well be doubted), there was the most reckless disregard of its interests and rights in the premises, and all, too, without the slightest notice to the surety of what was going on. This general fact shines through the contract of June 2, 1903. It shows through the obviously extravagant expenditures of the claimants and probably in other ways apparent upon the record."

We shall have more to say of the Hill case, but now turn our attention to the case of

TENNIS BROS. v. WETZEL.

Learned counsel for appellants deal at great length with that case reported in 140 Fed. 194, affirmed 145 Fed. 458, as also controlling in this case because therein Tennis was to be paid 10% while herein Hardaway & Prowell were to be paid 15%. They take the position that the two cases are the same except for the amount.

We can not agree to such assumption. The two cases are wholly different. In the Tennis case, Tennis was employed by the railroad company to do the railroad company's work and he was to be paid his 10% by the railroad company (140 Fed. 194), based on a cost supervised by the railroad company's engineer. In this case Hardaway & Prowell step into Coyne's shoes, and holding Coyne harmless, look to the job to work out their 15%, based on a cost with no supervision by any one but themselves. There is no analogy whatever between the two cases. We might have more difficulty if Hardaway & Prowell, by their contract, had their demand against Coyne, but Hardaway & Prowell's contract ex-

empts Coyne, they look only to the Government checks and thus they exonerate the Surety Company.

There can be no doubt that a sub-contractor could be employed on a percentage basis; but he nevertheless looks to his principal contractor and not to the work alone. When, however, one says: "I'll take your shoes, I'll furnish the money, I'll pay all bills, I'll take my percentage and you get yours if there be any left," he becomes the principal and not the sub.

What boots it by what name appellants be called, when the crux of the proposition is in their contract with Coyne? The contract fixes the status and defines the relative position and rights of the parties to it.

In the words of Judge Evans (R. 99): "To the certain knowledge of Hardaway & Prowell every remnant of control over the matter had been thrown off by every member of the firm of Willard & Cornwell."

This is the contract, and it is one of common occurrence: A says to B: "Let me take your place. I'll do that job, and if I get anything out of it I'll give you something." Just so it was here. If Hardaway & Prowell realized more than their 15% they were to give Coyne the excess.

Is that the contract of a sub-contractor? Not at all. The sub-contractor says to the general contractor: "I will charge you so much for that work, and I will look to you for payment." Is that what Hardaway & Prowell said to Coyne? Oh, no! To the contrary, they said: "We'll get the money out of the job alone; maybe something more for you; give us that plant and quarries; endorse the checks coming to you, or Willard & Cornwell, and we'll do the rest; and if anything is saved you get it." In short, while the sub-contractor would have held Coyne, Hardaway & Prowell released Coyne and taking his place looked alone to the work for their repayment. Their release of Coyne released Coyne's surety.

THE BOND.

The bond has a dual aspect: in the first place, to secure to the Government the faithful performance of the building contract; and in the second place, to protect the persons from whom the contractor obtained the material and labor.

The two agreements which the bond contains, the one for the benefit of the Government, and the other for the benefit of third persons, are as distinct as if they were contained in separate instruments, the Government's name being used as obligee in the latter agreement merely as a matter of convenience.

28 U. S. Stat. L. 278, 6 Fed. Stat. Ann. 125.
U. S., use Anniston Pipe & Fdry. Co. v. Nat'l Surety Co., 92 Fed. 549 (C. C. A.).
U. S. v. Rundel, 100 Fed. 400.
U. S. F. & G. Co. v. United States, 191 U. S. 416.
Hemmingsen v. U. S. F. & G. Co., 143 Fed. 813 (C. C. A.).

So far as this case is concerned, the bond is simply conditioned as follows: "Now, therefore, if the above bounden, Willard & Cornwell, their heirs, executors or administrators shall promptly make full payment to all persons supplying the labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void, otherwise to remain in full force and virtue."

The United States is no longer concerned with the bond, or with this litigation.

While it is expressly provided that a transfer of a Government contract, or of an interest therein, is void so far as the United States is concerned (U. S. Revised Statutes, Sec. 3737; 6 Fed. St. Ann., p. 123), it seems

to be generally conceded that such transfers, so long as the United States remains quiescent, is valid and binding upon the parties thereto.

Burch v. Taylor, 152 U. S. 634; 38 L. Ed. 578.
Dulaney v. Scudder, 94 Fed. 6 (C. C. A.).

If the transfers of this Government contract were not valid *inter partes*, but are vitiated by the provision against their transfer, then the appellants' claim rests upon a violation of the law, and they are absolutely without standing in a court of equity.

9 Cyc. 546, 547 and 549.
Edwards v. Randley, 63 Ark. 318; s. c. 36 L. R. A. 174.
2 Morawetz on Corporations, 2 Ed., Secs. 661-665.
Thorne v. Travellers Ins. Co., 80 Pa. State, 115.
Yarborough v. Avant, 66 Ala. 526.
Harrison v. Jones, 80 Ala. 412.

THE CONTRACT BETWEEN COYNE AND HARDAWAY & PROWELL.

It being clear that the United States is no longer concerned with any phase of this litigation, we come to inquire whether appellants' coming upon the Government work through the two contracts above referred to are beneficial obligees in the second aspect of the bond. We insist that they are not; that they are not persons supplying Willard & Cornwell labor and material in the prosecution of the contract with the Government. When appellants entered into their contract with Coyne they knew full well that Coyne alone was conducting the work. Their contract makes express reference to the agreement

between Coyne and his former partners by which, so far as all the world except the United States was concerned, Coyne had undertaken the sole responsibility for the contract, and had expressly agreed that all future liabilities incident to the contract should be his alone. The contract which appellants filed in support of their claim, and which is its foundation, is an express reaffirmation of the Coyne undertaking that J. E. Willard and Charles L. Cornwell were absolved from all liabilities growing out of the Government contract subsequent to the dissolution of the old Willard & Cornwell firm in February, 1901. This was an express agreement not to supply the principals in the bond.

The contractual arrangement thus made between J. E. Willard and Charles L. Cornwell and Joseph Coyne and Hardaway & Prowell prevents Hardaway & Prowell from claiming that they have supplied to the old firm of three members any material or labor entering into the construction of this lock and dam. We submit that Hardaway & Prowell are the assignees and successors in beneficial interest to the Government contract, and that their relation to that contract, so far as the appellee surety is concerned, is the same which the principals in the bond originally sustained to the contract.

To allow the appellants' claim would be to permit them to speculate at the surety's cost, in such manner that if successful in their undertaking they would gain 15% upon all money used in the contract, but if unsuccessful would collect all losses out of the surety without its consent and against its will.

There can be but one construction of the contract between Coyne and Hardaway & Prowell, and that is that Coyne was to incur absolutely no liability to Hardaway & Prowell so long as he put them in the way of collecting the Government checks, which he did. The contract grew out of the insolvency of Coyne, out of the eagerness of Prowell, stockholder, director and chief salesman,

to collect the Allen & Jemison debt, out of the prospect of large anticipated profits, out of Prowell's determination to possess himself of those profits, and to keep the Surety Company in ignorance of the then existing status of the contract work, with a view to preventing its taking over that work. The contract made under these circumstances was a clear speculation upon the part of Hardaway & Prowell. Coyne was broke, and they were trading on his downfall. That appellants' anticipated profits were designated as compensation does not change the nature of the contract, nor is the legal significance of the instrument changed because Coyne agreed in his pecuniary distress to sell his contract rights for a postponed and indefinite price contingent upon a possible profit, instead of exacting therefor a cash or fixed consideration. The contention made by counsel for appellants, that this was a contract of hiring is not borne out by the terms of the writing; nor can this meaning be injected into it by any amount of specious reasoning. We submit that under the terms of that contract Hardaway & Prowell have no call-back upon Coyne for any part of their alleged loss. There is not a sentence nor a syllable in the contract which makes Coyne liable for any money furnished or expended by appellants, unless Coyne should fail to secure the collection of the Government checks. As was said by the Circuit Judge in his opinion:

> "In the case before us no member of the firm of Willard & Cornwell is in any wise bound to Hardaway & Prowell for any part of the demand claimed, and yet it is sought to hold the surety on the penal bond for this claim, although the principals on that bond are manifestly not bound for it, and who if ever bound were released by the contract itself." (R. p. 100.)

The contention of counsel as to whether Coyne was or was not to pay the 15% commission in any event, is met by the whole tenor of the contract; this word "compensation" in the context can only mean that the appellants were to get that, just as they were to get back any money they advanced, out of the Government estimates or the retained percentages. Coyne has carried out his agreement to endorse the Government checks to Hardaway & Prowell. They say they have lost substantially more than $30,000. Should Hardaway & Prowell sue Coyne for that loss, is not the due endorsement of the checks a complete and ready answer to any declaration upon that contract? We submit that the contract between Coyne and appellants made the latter, at least to the extent of the anticipated profit of 15%, the successors in beneficial interest to Coyne, just as Coyne was the successor in beneficial interest of the old co-partnership of Willard & Cornwell. It would be just as reasonable to say that this surety would have been liable for any loss sustained by the principals in the bond had they carried the contract to conclusion, as to say it was now responsible for the losses of Hardaway & Prowell.

The proposition advanced by appellants is that they had the right without the knowledge of the surety to put it in the position of offering a premium of one hundred and fifty dollars upon each thousand dollars lost by appellants in the progress of this contract work—a condition palpably absurd.

But at last it makes little difference by what name we call, or how we construe, the Coyne-Hardaway-Prowell contract. This much is certain: That contract is made with express reference to the previous agreement between Joseph Coyne, J. E. Willard and Charles L. Cornwell of February, 1901. Hardaway & Prowell knew that what they expended was not supplied to the principals in the

bond. They knew that there was no contract relation between them and J. E. Willard and Charles L. Cornwell, or with the co-partnership entity, Willard & Cornwell. They further knew that they were not supplying labor, materials or money to enable the principals in the bond to execute the contract with the United States, because they knew that those principals had absolutely abandoned all effort to execute that contract.

As stated, counsel for appellants seek to have this case ruled by Hill v. American Surety Company, 200 U. S. 197, and to that end contend that appellants are sub-contractors of Willard & Cornwell. Let us trace out the relation of appellants to the original contract and the original contractors. The Government contracted with Willard & Cornwell. Willard & Cornwell contracted with Coyne. Coyne contracted with Hardaway & Prowell. But how did they contract?

Coyne as a sub-contractor would have looked to Willard & Cornwell to pay him for what he did or supplied. His contract is the opposite of this. He binds himself to look to them for nothing and to have all other persons look to him alone. Willard & Cornwell in letting a sub-contract would have retained control over Coyne and continued midway between him and the Government, responsible to pay him for what he did or supplied, and in a receptive attitude toward the Government to receive from it the presumably higher price it had agreed to pay for that labor or material. But as an antithesis of this, Willard & Cornwell got from between the Government and Coyne, put him into the receptive attitude by giving him a power of attorney to collect for his own benefit the Government checks, and requiring him to thereafter acquit them of all hazard in the contract. That these contracts could not be made to the prejudice of the Government, matters not at all; what they did was binding between themselves, and upon all who dealt with Coyne in conscious privity with the arrangement.

Burch v. Taylor, *supra.*
Dulaney v. Scudder, *supra.*

Coyne in this position of isolated responsibility then turns the work over to appellants, who require nothing further of him, except that he shall put them in the way of collecting the Government checks; which he has done. In this agreement, appellants by reference to the earlier contract between Coyne and his quondam partners, contract for the immunity of Willard & Cornwell from all liability to appellants on account of the latter's operation.

RELEASE OF A PRINCIPAL RELEASES THE SURETY.

It is axiomatic that when the obligee releases the principal the surety is discharged; that there can be no recovery from a surety where the principal is not liable.

U. S. v. Allsbury, 4 Wall (71 U. S.), 186.

Coyne had expressly released principals in the bond, and the attitude of Coyne is necessarily that of Hardaway & Prowell. To allow a recovery on the bond against the surety would be to allow appellants to do by indirection what they have expressly agreed not to do.

In that aspect of the bond now under consideration the United States is a mere conduit of benefit to the real obligee, who is the person supplying labor or material to the principal in the bond, and that real obligee may waive or relinquish his rights under the bond without in any way subtracting from the dignity or effectiveness of the Federal Statute.

U. S. use Anniston Pipe & F. Co. v. National Surety Co., 92 Fed. 549.
United States v. Rundel, 100 Fed. 400.
U. S. F. & G. Co. v. United States, 16 Ala. 145.

The laborer or material-man being as much the obligee in the bond as if his name appeared in its face, can of his own volition waive the liability of the surety, and is bound by his every act or omission, the legal effect of which is to discharge the surety.

The reasoning of the cases is that the United States may release the surety as to that portion of the bond in which it is interested by changes inconsistent with the original agreement; and that as to that portion of the bond made for his benefit the material-man may set the surety free by conduct or agreements inconsistent with the undertaking of the suretyship.

Discussing this bond, it is said in United States v. National Surety Co., 92 Fed. (C. C. A.) 549, 552: "On the contrary the act bears every evidence that it was intended to provide a security for laborers and material-men on which they could confidently rely for protection, unless they saw fit by their own dealings with the contractor to relinquish the benefit of the security."

Where the State of Nebraska had contracted for the erection of a hospital and had taken a bond dually conditioned after the manner of this Government bond, the surety sought to avoid liability to material-men on the ground that the State had not retained certain percentages as required by the building contract, the court held such defense insufficient, stating as a principal ground for the decision, "it is not alleged or pretended that appellees who furnished the materials or labor said or did anything to the injury of the appellant or to the prejudice of his own rights under the bond."

U. S. F. & G. Co. v. Omaha Bldg. & Cons. Co., et al., 116 Fed. 145 (C. C. A.).

The material-man being the real obligee, the bond stands or falls according as he retains or forfeits his rights. As long as he waives nothing the fact that the Government forfeits that part of the bond made for its own protection affects him not at all. The converse must of necessity be true.

Kansas City H. P. Brick Co. v. Natl. Surety Co., 149 Fed. 507.

U. S. use Phoenix Iron Co. v. California B. & C. Co., 152 Fed. 559.

The ordinary rules whereby sureties are discharged are just as available against material-men in this class of bonds as against any other obligee in any other surety bond. Any contention to the contrary must grow out of a failure to apprehend that the material-man is himself that obligee, and that it is by his acts, and not those of another, not even of the Government, that the surety is to be discharged. The peculiarity of the bond is not that it is above and outside the law, but that before the ordinary principles can be applied to it, it is necessary that the lawyer attempting to apply them must appreciate who is the real obligee therein. When the obligee is located, this bond finds itself at home among the time-honored principles governing principal and surety.

It is not the change of the contract with the United States which releases the surety. We have already seen that such a change does not enter into the principal-surety-material-man status. But, the thing which is vital in this case is that the arrangement as between the principal in the bond, the surety and the material-man has been twice changed, and that in vital particulars. The original contract, as evidenced by the bond in its second aspect, is that the surety is to pay for labor and material supplied to Willard & Cornwell (and Coyne), a co-partnership of three men. It can make no matter of difference, here,

whether this obligation be construed as extending only to creditors of the principals, or to persons supplying labor or materials to sub-contractors of the principals. The change is that Joseph Coyne first took an assignment of the Government contract in its entirety, and J. E. Willard and C. L. Cornwell divested themselves of every vestige of control over it. The surety is entitled to have the skill, character and business capacity of its principals interposed between it and liability. Here is a solemn agreement upon Coyne's part to substitute his skill, character and capacity, alone, for that of the three principals. The financial resources of all three principals stood between the surety and loss.

Hardaway & Prowell's agreement with Coyne expressly eliminated the financial resources of Willard and Cornwell, as a barrier between the surety and ultimate loss. In event of loss, appellants agreed to stand without recourse as against at least two of the three principals in the bond.

That this novation released the surety is elementary:

> Brandt on Suretyship (3 Ed.), Vol. 1, page 286, where the leading cases, with particular reference to partnership transactions, are collected and stated in their salient points.
>
> Lindley on Partnerships (2 Am. Ed.), Vol. 1, pages 245, 267.
>
> Child's Suretyship and Guaranty (a recent Hornbook), page 209, where the brief point is thus stated:

"If a person becomes surety for two or more persons he can not be held liable for any dealings with one only of them; nor can a surety for one be held liable for any dealings by that principal joined with another, although the surety knew that the principal was to be employed by the two jointly.

"These cases arise most commonly in respect to partnerships. A surety can not be held liable for

any dealings with the partners after a change in the membership of the firm causing its dissolution, whether it results from death, retirement of a partner, or from any other cause. Some of the partners may have possessed greater business capacity than the others, and the surety has the right to rely upon them all."

Without attempting to restate the cases discussed in our citation from Brandt's Suretyship, we call attention to the following cases, which support the above cited text:

"Guarantors of an obligation to secure the bank account of a partnership are released when, before any advances are made thereunder, one of the partners withdraws from the firm." Byers v. Hickman Grain Co., 112 Iowa, 451, 84 N. W. 500.

Sureties who contract for payment of rent by two lessees jointly are discharged by an agreement upon the part of lessor, without their consent, that one of the lessees may retire from the leased premises; and that the lessor will look to the other lessee for the rent, the court saying in part:

"The law presumes that the inducement of the surety to stand for the rent was based upon the character and husbandry of both parties; and that the obligation would not have been executed for one alone." Prior v. Kiso, 81 Mo. 241-250.

The sureties became bound for the faithful administration of an estate by Mrs. E. Watts and W. C. Boon jointly. Afterwards Mrs. Watts retired from the administration and Boon carried it forward. For default of Boon, after Mrs. Watts had retired, the sureties were held not liable, the court saying at the end of the opinion:

"The sureties in the present case may have been very willing to be bound for Mrs. Watts and Boon jointly, and utterly averse to assuming any responsibility for Boon separately. And when the attempt is made to make them responsible for the sole act of Boon, they have a right to stand upon the terms of their contract and say that they entered into no such agreement." State v. Boon, 44 Mo. page 254.

A surety upon a bond given by a co-partnership to an insurance company to secure the faithful performance by the firm of the duties of agents of the company, and payment to it of the amounts received by the firm as such agents, is liable in any action on the bond, after the dissolution of the firm by death of one of the partners, *only* for the amounts received by the firm as agents of the company before the dissolution. The court points out that the surety might have signed the bond solely in reliance upon the knowledge, business capacity, personal integrity and pecuniary responsibility of the deceased partner; and that whether he did or not, he was entitled to all of these; and when deprived of them, his suretyship *eo instanti* terminated. Conn. Mut. Life Ins. Co. v. Bowler (Holmes, 263), Federal Cases No. 3,106.

Mr. Justice Story, while sitting as Circuit Justice, made the following ruling:

"When money is advanced to a partnership under a guaranty, and the partnership is dissolved, and the debt is then carried at the request of the debtors to their separate accounts, and the partnership's account is discharged and no notice is given to the guarantor, the latter is released from all responsibility."

The opinion reads:

"If a creditor will undertake to give a new credit to his debtors and thereby materially to change the

situation of the surety, the latter is absolved from all responsibility, unless he has notice of and becomes a party to the new transaction."

Discussing the case in another of its phases this great jurist further said:

> "Unless then it shall be completely established that the advances were made on the joint account of the firm there is an end of the plaintiff's case." Cremer v. Higginson (1 Mason, 323), Federal Cases, 3,383.

A guaranty of payment for goods to be supplied to two partners is discharged by an arrangement between them and the creditors by which one of the partners retires from the business and no demand is made upon him for payment.

Bill v. Barker, 16 Gray (Mass.), 62.

This manifest and elementary principle is denied by appellants at pages 39 and 40 of their brief. The cases relied upon are:

U. S., for use of the Vermont Marble Co., v. Burgadoff, 13 App. D. C. 506.
City T. S. D. & S. Co. v. U. S., 147 Federal, 155.

The latter case is decided upon the unaided authority of the former. Both are at variance with the weight of authority. But, if they announced good law, they are not in point here, because neither of them involves a release of any one of the principals in the bond; and the case at bar involves the release of two, if not all three, principals. Those cases involve no waiver by the beneficiary of the bond, of the right to pursue, for his satisfaction, all persons whose faithfulness the surety guaranteed.

A positive increase in the number of barriers (partners) between the surety and ultimate liability is very different from the obligee in the bond (material-man) expressly incapacitating himself from proceeding against two out of the three members of the partnership, and then claiming against the surety. In the one case the principals remain as bound as before. In the other, we have the anomaly of a surety liable, and a principal released; the legal impossibility of a surety without the right of subrogation.

But to the point that those cases are antagonistic to the great weight of authority, Brandt says:

> "There are cases holding that where the principal associates another with him in the performance of his contract, the surety for its performance not consenting thereto, is not released. But the weight of authority is that the surety who is bound for the performance of the engagement of a firm is released if there be any change in its membership, unless he agrees to remain bound." Brandt on Suretyship, Vol. 1, page 829.

And this is certainly the law in Alabama, the State in which this business was done, and was at the time of these transactions.

> "Handley entered into a contract with the Crescent Brewing Company for the latter to ship him beer at Decatur. He gave bond with sureties to pay for all beer shipped under the contract. Immediately afterwards he entered into a partnership with one Petty, assuming the firm name of Handley & Company. All beer was shipped to Handley & Company. Default was made in payment for the beer, and suit was brought upon the bond. The sureties defended upon the ground that by the terms of their

contract they were bound only for defaults in not carrying out the contract made by Handley with the brewing company, and were not bound for any defaults Handley & Company or Handley & Petty might commit. This is the contract they made, and this is the contract declared on. Such is certainly the law. A surety may stand upon the letter of his contract, and is bound only by its terms. His liability can not be varied without his consent." Hand v. Crescent Brewing Co., 90 Ala. 486.

Hines was agent of the White Sewing Machine Company, and gave bond with surety for the faithful discharge of his duties. Afterwards Hines associated with him one Green as partner in the agency, with the consent of the sewing machine company, but without knowledge of the surety. Held, that surety was not liable for a default of the firm.

White Sewing Machine Co. v. Hines (Michigan), 28 N. W. 157, where are collected many cases to same effect.

In its facts the case of the Parham Sewing Machine Company v. Brock, 113 Mass. 194, are almost identical. And the holding is the same. The opinion reads:

"There was a material change in the conduct of the agency and the liabilities of the sureties. A new person was introduced, having equal powers to purchase machines and manage the business. While they (defendants) may be willing to be sureties for Delano, and may have been influenced to do so from confidence in his integrity and business capacity, it does not follow that they can be bound, or have consented to be bound, for the acts of any one whom Delano may have taken into partnership. They have made no contract to that effect, there is no evidence

of their consent to the change, and they are exonerated from liability." Parham, etc., Co. v. Brock, 113 Mass. 194.

In holding that a surety who guarantees the performance of certain conditions by a firm is not liable for the default of the firm after the addition of a new member, the Supreme Court of Illinois collects the cases, and thus reasons the proposition:

> "A party may be induced to become surety for the individuals who comprise a firm, because of his confidence in their integrity, prudence, accuracy and ability as business men, but he can not be presumed to have intended becoming responsible for the possession of such qualities by some third person who may be afterward taken into the firm without his knowledge or consent. It is often in the power of one partner, by want of discretion or integrity, to ruin another." Dupree v. Blake, 35 N. E. 867.

The above discussion is perhaps too remote from our exact proposition to properly appear in this brief, but it has seemed to us permissible in view of appellants' gross misapprehension of the law they seek to state. The effort is made to produce authority holding that the withdrawal of a member of a co-partnership, which is the principal in the bond, has no effect upon the liability of the surety. The case law of the entire country is ransacked and five adjudications are produced, one each from Georgia, Nebraska, Minnesota, Oklahoma and Washington. None of them bear out the proposition, and if they did, they would be in hopeless conflict with the current of authority, and antagonistic to elementary conceptions of the surety's rights. The Georgia case (123 Ga. 659; 51 S. E. 638) is in entire accord with our proposition, and is careful to show wherein the facts of that case are not within the rule releasing the surety:

"It was at Bazemore's (the surety) instance and request that Haigler took up the unfinished work of his co-obligee.

"We do not see how the risk of Bazemore was in any sense increased by the work being shifted from one contractor to the other one, when he was bound under the bond for the faithful performance of the contract by each and both."

Here there was no agreement on the part of the obligee to release Frey. And the surety, in order to avoid an unrelinquished liability of both his principals, was encouraging one of them to complete the work rather than to turn it over to strangers.

The Nebraska and Minnesota cases are closely related and are in no degree antagonistic to our position, but by plain reference lend assent to it.

In Kaufman v. Cooper, 46 Neb. 645; S. C. 65, N. W. 796, the ground of the court's holding that the surety was not released is this: Symonds & Blake had contracted with plaintiffs to furnish the materials before the dissolution of the firm, and both members of that firm (principals in the bond) were liable to plaintiffs. This appears plainly enough from the language of the opinion, but is made even clearer by the citations in support of the ruling, i. e., 17 Enc. of Law (1st Ed.), 1150; Freeman v. Berkey (Minn.), 48 N. W. 194; French v. Griffin (N. C.), 10 S. E. 166.

The text cited from the first edition of the Encyclopedia is:

"The dissolution of a partnership does not release it from contracts previously entered into, but unfulfilled. Each partner has the power, therefore, to complete such contracts, and to bind the other partners by his acts in so doing.

"Thus a tender or delivery of goods ordered before dissolution to one partner is sufficient, and his misappropriation charges the firm, and if a firm of commission merchants receive goods for sale before dissolution, selling them after a partner has retired, the claim of the assignor for the proceeds is a debt of all the partners."

In Freeman v. Berkey, one member of Murray & Folsom (principals in the bond) retired from the firm before the plaintiffs actually supplied certain stone, but after it had been contracted for by the firm. In holding that the surety was bound for the material the court says:

"The stone was furnished under contract with the firm and applied upon the contract with the city. A change in the relations between the partners merely did not affect plaintiffs to whom both were bound by the contract already made."

The North Carolina case of French v. Griffin involves neither a contract for public building nor a question of suretyship, but demonstrates the principle which the Nebraska court found determinative of Kaufman v. Cooper, *supra*:

"A co-partnership of merchants ordered of the plaintiffs certain merchandise. After the order was given the firm was dissolved. An effort was made to countermand the order, but the plaintiffs refused to allow it, and shipped the goods in accordance with the order. Held, that the partners were all liable, the court saying:

"The order was given and the contract entered into some days before the dissolution, and was binding upon all the members of the firm, so that it was unaffected by notice of the fact given to the plaintiffs

soon after. Such notice would protect against future dealing in the name of the firm by any member of it to whom credit was given. The future delivery was in consummation of the partnership contract, and gave it efficacy as the act of all the members of it, and involving a common responsibility."

Abbott v. Morrisette, *supra*, is a case involving a bond given for security of laborers and material-men, which is much broader in its terms than the one we are now considering. But we do not find it necessary to invoke that point of difference to show this citation inapplicable to the case at bar. The facts of the case are: After the plaintiffs had sold some building material to Milstead & Belyea, the principals in the bond, Milstead & Belyea dissolved partnership. Milstead took over the construction contract and completed it. After the dissolution, and "without knowing that fact," plaintiffs sold to Milstead other materials for the construction. The sureties claimed that they were not liable for the sales made to Milstead alone. It is at once apparent that the court, in holding the surety liable, is sustained by this familiar rule of the law of partnership:

"All persons who have had dealings with the firm before its dissolution are entitled to actual notice of the dissolution; and until such notice is given, all partners remain liable to such persons for all credit extended to one member upon the credit of the co-partnership." 22 Enc. Law, 178.

Under the facts of this case Belyea was held to be liable to plaintiffs no less than Milsted. Hence the surety's position, in the opinion of the court, had been in no wise changed. The facts of that case is in close analogy to the $13,000 of claims for the materials supplied to Joseph Coyne between the dissolution of the firm of Wil-

lard & Cornwell and that of his contract with Hardaway & Prowell. As to those claims, appellee recognizing that it was incumbent upon it to show actual notice of the dissolution of the old firm to those claimants, and doubting whether the proof was entirely clear on that point, accepted the decision of the Circuit Court and paid the claims. The question presented here is wholly different. For appellants not only knew of the dissolution of the old firm, but expressly contracted for the absolute immunity of the retiring members from all liability on account of the work.

Had the Minnesota case been conversely stated—that is, had the surety not known of the dissolution; had the material-men had actual notice thereof, and with special reference thereto, agreed that the retiring members should have been wholly released from all liability to him, an analogy to our case would be present, and it is safe to say that the Minnesota judge would have written quite a different opinion.

After an examination of the Oklahoma and Washington cases, we confess ourselves unable to discuss them in connection with the brief point to which they are cited by appellant, so widely divergent are they in facts and principle from the instance case.

The stream cannot flow higher than its source. Coyne had cut himself off from any claim against his former partners. Coyne is the source of Hardaway & Prowell's rights in this business. In consciously accepting his disability, they released him so far as they were concerned. Therefore, in the last analysis, it cannot be material how we construe the contract between Coyne and Hardaway & Prowell. It is enough to know that such contract released Willard & Cornwell, and Coyne as well, and in releasing them, released the surety.

Hardaway & Prowell, virtually parties to, and clearly bound by all the consequences of the first change

in the contract status, affected a further and even more sweeping change. By their contract of June 2, 1903, the last member of the original co-partnership principal was divorced from all control over the Government work, and they themselves, total strangers to the surety, were substituted in its management.

According to the contention of appellants, even a further change was made; an agreement was attempted to be foisted upon the surety, whereby the persons managing the work were no longer primarily liable for loss incident to mismanagement or misfortune, as were the persons for whose management the surety contracted. Instead of continuing the primary liability, the change not only releases the new managers of all liability, but guarantees that no matter how unskillfully they conduct this work, no matter how many disasters attend their operations, they can not lose, but must in any and all events realize a net profit of fifteen per cent. Under appellants' theory, the original condition under which the person managing the work had every incentive to prevent a loss, was changed to a condition where the incentive is to lose because the greater the loss the larger the profit.

CASE FURTHER DISTINGUISHED FROM HILL CASE.

The case of U. S. for use of Hill v. Amer. Surety Co., (Jan. 2, 1906), 200 U. S. 197, is different from the case at bar in yet another respect. It is true that that case gives the bond in question a more far-sweeping construction than had previously been accorded it (American Surety Co. v. Barret, 127 Ala. 349), but what it decides is this, and this only: that persons working for and supplying material to a sub-contractor of the principal in the bond,

the principal being in the actual conduct of the Government work, can recover the value of their materials or services from the surety. The expression "supply them" (the principals) with materials and labor, is held to be broad enough to include materials and labor supplied to the principals either directly or indirectly, so long as they are supplied for the fulfillment *by the principals* of their engagement with the Government. In the case at bar there are no sub-contractors of Willard & Cornwell, the principals. In the Hill case there was no express agreement upon the part of the claimants that they would not look to the principals for payment; in the case at bar the appellants had succeeded the principals in the entire control and management of the contract work. In the Hill case the claimants were painters who had supplied the labor by the exercise of their own bodies, and the material from the end of their brushes. The Hill case contains nothing which tends to make Hardaway & Prowell obligees in the bond. In the Hill case, the principals were going forward in the active prosecution of the Government work, and this was known to the claimants. In the case at bar the principals had abandoned all efforts at carrying forward the Government work, and this abandonment was known to the appellants, and they had contracted with express reference to such abandonment without the knowledge of the surety.

We believe that case reaches the uttermost limit to which the Supreme Court will extend the surety's liability. But, even should we regard the Hill case as deciding that the bond was equivalent to an obligation upon the part of the surety, "that the principals shall well and truly pay for all materials and labor entering into or employed in the construction," as the Nebraska bond was worded in U. S. F. & G. Co.v. Omaha B. & C. Co., et als., 116 Fed. 145 (C. C. A.), we submit that Hardaway & Prowell would not be entitled to recover; first, because they made a change in the contract which released the

surety; and, second, because they expressly contracted that they would not look to the principals for payment.

In U. S. F. & G. Co. v. Omaha B. & C. Co., supra, as we have already pointed out, the opinion of Judge Caldwell plainly shows that had the claimants for labor and material been guilty of varying the terms of the surety's liability, or of any conduct prejudicial to their own rights, the recovery would not have been allowed, and this, we submit, is fundamental.

But it is not to be conceived that anything short of an Act of Congress will ever give to the bond in question the far wider scope of the Nebraska obligation. And, it matters not how broadly the terms of the bond may be construed, no court will ever hold that the well-established principles of the common law, by which a surety is discharged by certain acts or omissions of the obligee, will be abrogated in favor of laborers and material-men.

RECOVERY AGAINST THE SURETY UNCONSCIONABLE.

The Hill case accentuates the necessity of fair dealing upon the part of any person who seeks to avail himself of the provisions of this bond, and as an instance of unfair dealing the case of United States for the use of Heise Bruns & Co. v. American Bonding & Trust Co., 89 Fed. 921, is cited, the facts of which are embodied in the first head-note thereof as follows:

> "A company proposing to act as surety on the bond of a government contractor, asked a firm whether they knew of any outstanding liabilities on the part of the contractor, to which the firm replied in the negative, though the contractor at the time owed money to the firm. It was partly owing to this

reply that the company signed the bond. The firm thereafter supplied the contractor with materials for the work, in reliance on the security furnished by the bond, which was conditioned on full payment of work and materials. Payments were made by the contractor to the firm, nearly sufficient in amount to cover the cost of these materials, but they were applied on the pre-existing debt. Held, that the firm could not recover on the bond."

We submit that the want of candor and frankness, which characterized the Heise Bruns transaction is as nothing compared with the secretiveness and want of good faith exhibited throughout this transaction by the appellants. The terms of their written contract with Coyne show that, as they then viewed the matter, there was a large profit to be realized from a completion of the work, so large that they expected, after having pocketed a net profit of fifteen per cent, they would be able to turn over a surplus to Coyne. This estimate of the value of the contract to them continued uppermost in their minds for a considerable period after taking charge of the work, *as is evidenced by their allowing Coyne to anticipate his expected surplus to the extent of* $908.97. (Record pp. 127, 128, 137.)

Of course, it was the right of the surety upon Coyne's failure, as it would have been its right at the time of Willard & Cornwell's abandonment of the contract, to take over the work and complete it, but in their eagerness to prevent this very thing, and to avail themselves of the large anticipated profits, they connived with Coyne to keep the Surety Company in total ignorance of the then existing status; *and it is only when their expected profits have turned to losses* (or when, perhaps, they have thought it well to claim losses which were, in fact, profits), that they come to acquaint the Surety Company of the failure of Coyne. We submit that they do not come into

equity with clean hands; that they can not thus trifle with the remedial policy of the law, as evidenced in the requirement of this bond from Government contractors, that, even if by a wide stretch they could be deemed sub-contractors, they then would pointedly fall within these words of Judge Day's opinion in the Hill case, to-wit:

> "Of course this rule would not extend to cases of fraud or unfair dealing on the part of a sub-contractor, as was the case in United States use of Heise v. American Bonding & T. Co., 89 Fed. 921, 925, or to cases not otherwise within the scope of the undertaking."

How much stronger than to a sub-contractor does that language seem to apply to appellants, Hardaway & Prowell, who were not sub-contractors, but who stepped in to do the work for a prospective large profit, withholding the facts from the Surety Company, looking only to the work for reimbursement, and not to Coyne or Willard & Cornwell, or the Surety Company.

Upon this question of good faith, Judge Evans says most pertinently:

> "At this point, if Hardaway & Prowell did not know of the penal bond, of course, they did not contract with any reference to it. On the contrary, if they did know of the bond, good faith and every applicable equitable consideration demanded that full notice of the proposed change in the situation should be given to the surety—a party vitally and obviously interested—to the end that it might have the opportunity to agree or to object to this most important change, and take steps to protect itself. Failing to do this, the claimants put themselves in an attitude wholly inconsistent with a just right to claim against the surety, who had been

ignored and disregarded at the outset, * * * It can not be that a right to make a new contract existed whereby the most licentious expenditures could be made, and a commission thereon charged to the surety without giving it an opportunity or chance to participate in the making of such an agreement."

Opinion Circuit Court, R. 100.

IF APPELLANTS WERE SUB-CONTRACTORS, THEY WERE SUCH FOR A FIXED PRICE, WHICH HAS BEEN PAID.

Although it is impossible to conceive of the contract between appellants and Coyne, making the former sub-contractors, yet, as is suggested, in the opinion of the Circuit Court of Appeals in answer to appellants, insistance that they occupied that relation—if they were sub-contractors, they took the job for what Coyne had in it, viz: the monthly estimates and such rights as he then had in the retained percentages; the latter being subject to the surety's right to apply them to payment of any liability, which might be brought against it by default in the obligations of the bond. Appellants took them subject to that equity. This equitable application was made by the Circuit Court in paying the thirteen thousand dollars of the debts of Coyne, incurred before he contracted with appellants; an application to which the surety was entitled, not only under the express assignment thereof, made by Willard & Cornwell at the time the bond was executed, four years before Hardaway & Prowell appeared upon the scene, but also under the perfect equity, existing independent of contract, of the surety to be subrogated to any rights of either the United States, or the material man-laborer might have against this fund.

"The stipulation in a building contract for the retention of a certain portion of the consideration until the completion of the work is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed. It raises an equity in the surety in the fund to be created."

Prairie St. Bank v. U. S., 164 U. S. 227.

"* * * On precisely the same principle the surety is entitled to be subrogated to the rights of the laborers and material-men, where, as in the present case, it is compelled, by reason of the obligation of the bond, to pay them for labor and materials because of the default of its principals. That right of subrogation relates back as was held in Prairie State Bank supra, to the time the contract of suretyship was entered into."

Hemmingsen v. U. S. F. & G. Co., 143 Fed. 810.

However, we can not hope to improve upon the answer to this line of appellants' argument, made by two opinions of Judge Lurton rendered in this case. Whether we regard Hardaway & Prowell as assignees, agents, subcontractors, superintendents or what not, they are volunteers in this business, and are, for that reason, without right to the retained percentages.

CLAIM NOT A LIEN.

A mechanic's lien is a creature of the statute only. We are not dealing with a mechanic's lien because the statute under which appellants prosecute their claim does not provide for any. It merely provides for payment of claims for labor and material furnished. Unlike the mechanic's lien law which gives a lien upon the land, this

gives no lien, but compels the contractor to produce a surety; and that statute does not enlarge the liability of the surety over the liability of a surety in other undertakings.

We are not dealing with Hardaway & Prowell as mechanic's lien holders; we deal with them merely as transferees of Coyne's contract; and seek to determine whether on their substitution for Coyne they can look to the surety, who never knew them.

CLAIM NOT FOR MATERIAL OR LABOR.

We insist that claimants should not be allowed to recover for a reason quite different from any that has been heretofore advanced. It is entirely clear that this claim is neither for labor nor material within the purview of the bond and the statute requiring the bond. Each laborer has been paid. Each material-man has been paid. The object of this statute has already been accomplished; the laborer has been paid as also the material man. The arrangement made by Coyne with Hardaway & Prowell was not for the furnishing of labor and material within the meaning of the bond, but for financial backing and assistance of the larger sort, which the bond was never intended to comprehend.

This claim is an analogy to the claim of the bank which lent money for the purpose of paying for work and material, and even under the arrangement went so far as to pay money direct to the laborer and to take up the labor check as evidence of payment. That bank was held not to be protected by the terms of the bond.

United States v. Rundle, 107 Fed. 227.

The object of the bond is to require the surety "to secure the payment for the visible material that was

furnished for direct use and incorporated in that work, and the payment of wages to the men whose services were directly employed in doing the work." Thereby the surety had a direct conception of his liability. He was not compelled to see to it that money borrowed or advanced to aid in the prosecution of the work should be repaid.

United States v. Kimpland, 93 Fed. 403, 406.

While the bond creates an obligation *in personam* and not a right *in rem;* and rights under it are to be worked out under principles fixing or discharging personal liability (Sears v. Mahoney, 66 Fed. 860), yet, in determining what persons are intended to be made obligees in the second aspect of the bond, we may inquire to what persons the mechanic's lien is extended.

It has been uniformly held that no lien can be had for money loaned, with which material was purchased, or labor paid, in favor of the lender.

20 Enc. of Law (2d Ed.), 349.
34 Century Digest Col. 2142.
Godeffray v. Caldwell, 2 Cal. 489, s. c. 56 Am. Dec. 360.
Williams v. Bradford (N. J. 1891), 21 Atl. Rep. 331.
Int. B. & L. Asso. v. Fortassian (Tex.), 23 S. W. 496.
Gaylord v. Loughbridge, 50 Texas, 573.
First Municipality v. Bell, 4 La. Ann. 121.
City of Hamilton v. Stilwaugh, 11 Ohio Cir. Ct. R. 182.
1 O. C. D., 324.

Nor can a lien be had in favor of one who lends his credit to another to enable him to purchase materials.

20 Enc. of Law (2d Ed.), 349, and cases cited.

A person who advances money to a vendee to pay for land is not entitled to the vendor's lien, even though the vendee may have promised him such, or he may have taken a mortgage or a note reciting the alleged existence of such lien.

29 Enc. of Law (2d Ed.), 749.
Chapman v. Abraham, 61 Ala. 108.
Jones v. Kennedy, 138 Ala. 502.

A statutory lien on steamboats for work done or material furnished does not extend to a claim for money loaned to the master to be applied by him in discharge of debts which were a statutory lien upon the vessel.

Steamboat James Battle v. Waring, 39 Ala. 180.

It is the general, if not the universal rule, that statutory liens for rent, stumpage, hotel and livery stable bills, and the like, are not available to persons advancing money to discharge these respective obligations. The lien laws, and laws in analogy, were never intended for the money lender. He is regarded as having an advantage which enables him to protect himself by contract and renders him independent of ready made security.

An officer of a corporation, who, without any obligation on his part, and merely to befriend laborers employed by the company, advances the amount of their wages without an assignment of their claims, can not be subrogated to such liens. Nor will a merchant who pays store orders given to workmen for their wages be subrogated to a preferred claim for wages conferred upon such workmen by statute.

27 Enc. Law (2d Ed.), 257 and cases cited.

A person who advances rent on land to a tenant will not be subrogated to the landlord's lien in absence of any agreement for subrogation. Gerson v. Norman, 111 Ala. 433. See also, Bostic v. Ammons, 62 S. Car. 302. A person advancing money to a married woman for the purchase of necessaries is not subrogated to the favored position of the person furnishing such necessaries. Skinner v. Tirrell, 159 Mass. 474.

One who lends money to keep a broken down railroad going and to pay for labor and necessary supplies has never been regarded as entitled to an equitable lien accorded to those who actually supply labor and material. See cases cited by Judge Lurton, page 128 of the record.

In their brief appellants' counsel argue with apparent seriousness that the money lender is within the protection of this bond. They even cite Prairie Bank v. U. S., 164 U. S. 227, and Hemmingsen v. U. S. F. & G. Co., 143 Fed. 810 as sustaining that contention. It is true that the statement of facts in each of these cases casually notes that the proof of the application of the money lent to payment of labor and material was not entirely clear. However, the opinions are reasoned out as if such proof had been satisfactorily made; and the law as applicable under such proof is the law declared. Appellants naively ask, "What possible reason could exist for giving redress to A who procured labor and material, and denying redress to B whose money procured such labor and material? If such distinction is drawn there ought to be some sound principle of law or equity to support it." There are both sound, legal and equitable principles. The legal, are that the liability is controlled by the words of the bond, as those words are prescribed by the statute; that courts construe statutes as they find them; and that through a long line of decisions the courts have declined to extend the benefits of statutes of this character to mere voluntary money lenders. The equitable principle is, that while the doctrine of subrogation has been evolved

from the judicial conscience for the purpose of putting one man in another's place to avoid certain conditions of hardship, this doctrine has never been applied to a mere volunteer in paying another's debts or lending another money; such volunteer having suffered no hardships from the universality of the common law. Prairie Bank v. U. S., supra; Insurance Co. v. Middleport, 124 U. S. 534; Greenville Savings Bank v. Lawrence, 76 Fed. 545 C. C. A.

Small wonder that the only case appellants could find subrogating a person who advanced money to the lien of the laborer was the case of a surety who completed a contract to prevent a default for which he would have been liable. Evans v. Lowe (N. J.), 58 At'l. 295. The case of Greenville Savings Bank v. Lawrence, supra, could not more completely meet appellant's argument upon this point had the opinion been written for the very purpose. The bank contended that because it had advanced the money to pay the contractors' current pay rolls and bills for material, it had at least the same equity as the material-men to share in the percentages retained under the terms of the building contract. Of this contention the court said: "There was no intention to keep the claims alive for the protection of the bank—the bank relied on the expectation of getting the Government checks and being paid by Lawrence" (the contractor) "out of them, and not upon any agreement that the labor and material claims should be assigned to it." The court then quotes, as governing the case, Section 240 of Sheldon on Subrogation: "The doctrine of subrogation is not upheld for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make payments, and without being compelled to do so for the preservation of any rights or property of his own."

A holding in the opinion of Judge Taft in Central Trust Co. v. Bridges (C. C. A.) is also directly in point. A bank claimed a mechanic's lien on a railroad because

the money lent by it to the general contractor was used by him to pay for labor and materials in the construction of the road. The court said that it could not under "any theory of law" give the bank a lien, and that the loan simply made the bank a general creditor. 57 Fed, 753, 774.

To allow appellants' contention, that a person supplying money with which material is bought or labor paid, is protected by this bond, would do violence to the plain words of the statute, which only binds the contractor "to make full payment to all persons supplying them labor or material," and not "money with which to buy material or pay labor." If the words "supplying them" are to continue to be construed as "supplying them or any of their sub-contractors," and if "money to buy or pay" is then to be judicially read into the contract, the contractor and surety are indeed in a sorry plight. They will be under the necessity of acquainting themselves with all the collateral and incidental monetary arrangements of every person connected with the work, a task which, when the contract work is of any magnitude, can only lead to confusion; and, in the aggregate of Government contracts, to greatly increased litigation. While upon a large contract it is difficult to ascertain that every person actually working or actually supplying material is paid; it is indefinitely more difficult to carry out an effective inquisition as to the indebtedness of every man who may chance to have any sort of contractual connection with the work.

SPECIAL REFERENCES TO APPELLANTS' BRIEF.

Appellants' counsel seem to be impressed that there is some advantage to them in making it appear that the two courts, which have heretofore found against them, differed in respect of the reasoning under which they

reached the same conclusion. For instance, they say at one place in their brief that the Circuit Court found against them, "upon the ground that the appellants were not sub-contractors, but were successors of the contractor," etc. "* * * The Circuit Court of Appeals affirmed the case upon entirely different reasons." It is true that the Circuit Court did in its opinion assign as one ground of its decision the reason quoted in appellant's brief. But the opinion of that court supports the conclusion reached by numerous other equally cogent reasons, viz: 1st, because good faith demanded that full notice of the proposed contract should have been given to the surety—a party most vitally and obviously interested—to the end that it might have the opportunity to agree or object to the arrangement and to take steps to protect itself. (Record, page 100.) 2nd, because the release of the surety necessarily resulted from the radically changed situation created by the new contract. (Record, page 100.) 3rd, because "it can not be that 'as against the surety' a right to make a new contract" between Coyne and Hardaway & Prowell "existed whereby the most licentious expenditures could be made and a commission thereon charged to the surety without giving it any opportunity or chance to participate in the making of such an agreement." (Record, page 100.) 4th, because the surety never agreed that a profit should be made out of the contract with the Government, as a whole, or that any loss upon such contract would be paid by it. (Record, page 101.) 5th, because there was the most reckless disregard of the rights of the surety without the slightest notice to it—a general fact shining through the contract between Coyne and Hardaway & Prowell and through the obviously extravagant expenditures of the claimants. 6th, because the claim is not in many respects satisfactorily proved. (Record, page 101.) 7th, because to enforce the contract between Coyne

and appellants against the surety would be to put the surety at the mercy of parties it had never heard of; to put it under a contract it had never seen; to make it liable for prices and quantities of material without the curb that would have always been present had claimant's own interests and profits depended upon economy and good management, instead of upon large expenditures upon which a large commission was to be paid. 8th, because Section 3468 of the Revised Statutes of the United States gives to a surety, when the principals are insolvent, a priority for the recovery of its losses out of the estate and effects of such insolvents, and to allow claimants' contention would be to deny to the surety the benefit of that statute. (Record, page 101.)

The opinion of the Circuit Court of Appeals voices no word or suggestion of disagreement either with the reasoning or conclusions of the Judge on Circuit. It proceeds to show that further than and beyond the reasons he assigns, his judgment is to be upheld upon yet additional grounds sufficient in themselves. Since counsel have stated what they conceive to be the attitude of the Appellate Court, we crave the same privilege. It seems to us that the court was speaking directly to the two considerations most insistently urged upon its attention in argument; and that viewing the case, as appellants' argument sought to have it do, only from the standpoint of these two insistences, thus sized up the situation: "You say you were sub-contractors. We hardly think so. But if you were, you were such for an agreed price which you have received; and that ends the matter."

"You say that there was an implied agreement to reimburse your every outlay. We do not see it that way. But even if you are right, that makes you a voluntary lender of money and you are not included in the bond. This disposes of your contentions; it is needless to pursue the subject further."

Tennis Bros. v. Wetzel & Tyler Ry. Company, 140 Fed. 193, can not be tortured into an analogy to the case at bar. The agreement therein was for Tennis Bros. to work under the immediate supervision of the railway company's engineer; to get prices and submit them to the railway company, but to buy nothing themselves; to submit their payrolls to the railway company for approval and payment every other week; and to receive direct from the railway company ten per cent. on the outlays made under these safeguards as their compensation. The citation serves to show how carefully men, who are allowed the opportunity, safeguard and limit expenditures upon which they pay a percentage commission. Thus is further demonstrated the unrighteousness of fostering upon this surety a contract, characterized by the absence of every safeguard against excessive expenditure, wherein, for the usual curb of economy, is substituted an incentive to squander. Men will not willingly enter into such contracts. We take it that so unequal an arrangement will never be forced upon a surety at the instance of those who made and speculated upon it for a year and a half, without the knowledge, much less the consent, of the surety. Such exploitation of the unsuspecting is not the province of a court of conscience.

APPELLANTS CLAIM A FRAUD.

The Circuit Court said: "The claim is not in many respects satisfactorily proven."

The record bears out this mild statement abundantly. Appellants claim to have been expending, not their own money, but the money of this surety. They assert that all unbeknown to the Surety Company they have been its stewards. Men occupying so unique a position owed a manifest duty to make the most careful and accurate

showing of their expenditures, and to exhibit the highest degree of frankness in all that pertained to this business. Yet they can show nothing. If they can, they will not. Their claim, covering 68 pages of the Circuit Court of Appeals record, consists of 49 pages of names and amounts, purporting to be copies of pay rolls, sixteen pages of lists of materials and three pages of summary. It elicits no confidence, for it ties to nothing contained in the account books of the firm, which are in evidence in this court. It balances with nothing, and is contradicted by every test which can be applied to it. But this will be minutely discussed in connection with the testimony of Prowell. The summary shows:

Material	$10,312.28
Labor	40,061.11
	$50,373.39
15% commission	7,556.00
Credit from payment of Government estimates	26,688.06
Balance for which the claim is filed	$31,241.33

Both claimants are examined as witnesses. Although claiming to have been acting as the stewards of this surety for a year and more, expending thousands of dollars of its money, and claiming a handsome commission for such self-assumed stewardship, they testify as if resentful of any inquiry being made into that conduct of its business which every consideration of honor and decency should make them eager to explain. Instead of a candid readiness to verify every charge and justify each item of expenditure, their evidence is evasive, dilatory and sullen. It lacks all semblance of openness, consecutiveness or orderliness. We submit that it fails to inspire confidence and engenders distrust.

Hardaway plays the innocent. He does not know in whose name the checks through which the firm received $26,688.06 from the Government were drawn, nor how they were signed. He does not know whether $8,000 advanced by him in the progress of the work was repaid to him or not. He does not know how the firm books were kept. He does not know whether the labor was paid in checks or money, nor how often it was paid, nor the approximate amount expended for labor monthly. He does not even know whether the labor has been paid or not. Does not know to whom the firm is indebted. Though he is given every opportunity, his testimony throws absolutely no light upon the account. (R. pp. 21, *et seq.*)

Prowell is unable to produce anything in all the accounts of the firm to bear out the figures of the claim. He is further unable to take the firm accounts and construct from them any intelligible or balanced account verifying these figures. He can not tell what moneys he received nor when. He can not tell what money he spent, when, or for what. We submit that the perusal of his testimony discredits not only his ability as an accountant, but his credibility as a witness.

Unable to stand the probing into his alleged losses, he takes refuge in the bank statement of deposits and checks. (Record, pp. 108, *et seq.*) This is his cash account, the whole record of money received and spent, his only proof to aid his affidavit. He testifies:

> "The checks drawn by Hardaway & Prowell upon the Merchants National Bank, except for comparatively small amounts paid directly to labor, show all money disbursed by Hardaway & Prowell, except $1,000 paid through the First National Bank."

By this statement amounting, with the $1,000 added in, to $57,410.59, he attempts to prove his claim of sub-

stantially the same amount, $57,929.39 (material, $10,-312.28; labor, $40,061.11; and commissions, $7,556.00). The only trouble about this fair-seeming proposition is that the equation disproves itself, in that the commission of $7,556.00 is not included in the bank statement. (Record, pp. 108, *et seq.*)

The above equation was of his own making; but seeing its falsity established, he tries to escape from it by showing that his volume of business was greater than he had at first indicated by filing a statement of the firm indebtedness (Record, p. 106). This statement foots $24,764.40, concerning which he testifies:

> "In order to arrive at the full total of money turned over, or credit, which is in the completion of the work, you will have to add to the bank statement of $57,410.59 the sum of $24,764.70, the present indebtedness of the firm, making $82,175.29."

If this were true, the claim should have been filed for $82,175.29
Plus 15% Commission..... 12,326.35

$94,501.64
Less Government estimates..... 26,688.06

Making $67,813.58
instead of $31,241.33.

It is to be remembered that the bank statement included no commissions.

But to treat the witness more fairly than he treats himself, we may take into consideration that the three largest items in his statement of indebtedness are most probably duplicated in the bank statement, and that a fairer addition for outstanding debts is $5,055.26, under which the claim would be:

Bank statement	$57,410.59
Debts	5,055.26
15% on both above	9,369.88
	$71,835.73
Less Government estimates	26,688.06
Making	$45,147.67

instead of $31,241.33.

Although it is the appellants' sole dependence to establish their claim, the bank statement can prove nothing, unless that it was deliberately made the basis of this claim, its sum total being arbitrarily divided into so much for material and so much for labor, and to this a few hundred dollars added to meet the contingency of its being shown that a few disbursements were not made by check.

The evidence shows that the bank account was not kept in a manner to make a record of any department of appellants' business; sometimes labor was paid in cash, sometimes by check. Sometimes merchandise was paid for in cash, sometimes by check. Sometimes money taken in at the commissary was deposited, sometimes it was not. By means of checks and deposits the same money was used over and over again. In this business, as in every other, the total of checks drawn was far in excess of the actual cost of conducting the business. Out of this, a well-known system of wild-cat financiering known as "kiting" has grown up. The pass-book has been made to represent large deposits when smaller sums have been repeatedly checked upon and redeposited; and that is the effort here. The sum total of the checks drawn is absolutely no criterion of the cost of this work. Yet it is the only proof thereof offered by appellants.

We submit, that in this state of the proof, absolutely the only trustworthy evidence of the value of this work is the monthly estimate of the Government engineers, who have certified that the value of the work, according to the prices fixed in the contract with Willard & Cornwell, is just about half of what appellants say it cost them. We remember how alluringly profitable Hardaway & Prowell had regarded those prices. Washouts, which so far as the testimony is concerned, are largely fictitious, can not explain this discrepancy. There is not a single word in the whole evidence in regard to washouts, and if the averments of the bill in this respect are relied upon, it is well for the court to have before it exactly what the bill says on this subject, viz:

> "Your orator shows on information and belief that by reason of said defendants (Willard, Cornwell and Coyne) not giving said work their personal supervision, several expensive washouts on said work, and other large unnecessary expenditures and expensive delays occurred, which otherwise would have been avoided."

From the bill it does not appear that any washouts occurred during the Hardaway & Prowell regime, and the ten-day reports made by the Government officers (Record, 61, *et seq.*), a continuous and faithful diary of the work show no disastrous washouts; so insignificant that appellant has omitted printing them.

In the absence of a better explanation than has been forthcoming, had not the Circuit Court good ground for saying that if the claim be proved at all, "immensely and recklessly was increased the cost of the work," and "the most licentious expenditures were made?"

We believe a careful reading of the record will justify our prayer for an affirmance.

Respectfully submitted.

WILLIAM W. WATTS,

HENRY FITTS,

Solicitors for Appellee.

WILLIAM J. GRIFFIN,

Of Counsel.

44.

No. [redacted]

Office Supreme Court, U.S.
FILED.
JAN 6 1908
KERN

Supreme Court of the United States

October Term, 1906.

B. H. HARDAWAY and R. P. PROWELL,
Partners as Hardaway & Prowell, - **Appellants,**

vs.

NATIONAL SURETY COMPANY, - - **Appellee.**

BRIEF FOR APPELLANTS.

TEMPLE BODLEY,
Counsel for Appellants,

JOHN BRYCE BASKIN,
J. MANLY FOSTER,
W. B. OLIVER,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1906.

NO. 654

B. H. HARDAWAY and R. P. PROWELL,
Doing Business as Hardaway & Prowell, - - Appellants,

vs.

NATIONAL SURETY COMPANY, - - - - Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

Willard & Cornwell, a firm of contractors, composed of James E. Willard, Charles L. Cornwell and Joseph Coyne, on the 28th of September, 1899, entered into a contract with the United States, wherein said contractors agreed to construct lock and dam No. 4 in the Black Warrior river, near Tuscaloosa, Alabama (Record, p. 19).

The contractors executed bond, with appellee, National Surety Company, as surety for the faithful performance of the contract (Record, p. 9). The bond contained a clause (required by Act of Congress, approved August, 1894), that the contractors would

> "promptly make full payments to all persons supplying them labor and materials in the prosecution of the work."

The contractors carried on the work until February 5, 1901, when they made an agreement, entirely between themselves, by which said Coyne undertook to finish the work, to pay the debts of his firm and to make all future purchases in his own name, he to receive all profits from the contract (Record, pp. 89 and 90). The United States was not asked to consent, and did not con-

sent to this arrangement between the contractors (Record, pp. 13 and 99). The work was, after February 5, 1901, continued by Coyne. The Government, as before, made all payments by checks payable to "Willard & Cornwell" (Record, p. 13). The contract itself provided that they should be so made payable (Record, p. 91).

On June 2, 1903, Coyne, being financially unable to complete the contract, made a written agreement with appellants to finish it (Record, p. 90, etc.). Appellants completed the work and it was finally accepted and paid for by the United States (Record, pp. 13 and 14). The Government, therefore, has no interest in this litigation.

During the progress of the work, several freshets or washouts occurred, thereby making it necessary for appellants to do over a large part of what had before been done (Record, p. 49). This is not contradicted. To complete the work cost appellants, over and above the amounts received from the United States, $32,757.34, including interest to March 1, 1906, and also including $7,556.00, being 15 per cent. on the cost expended, which sum was, under the contract, due to appellants for their compensation (Record, p. 17).

On October 24, 1904, appellee filed a bill in the United States Circuit Court, at Louisville, averring the insolvency of the contractors, and that there would be a loss for labor and materials, which it, as surety, would be compelled to pay, and making the usual averments for an injunction and the appointment of a receiver (Record, p. 1, etc.).

A temporary restraining order was granted, but, on November 8, 1904, an agreed order was entered, vacating the restraining order and referring the cause to a special master. The order provided that parties having claims for labor and materials might prove the same by affidavits, but the right to contest the claims and to take proof as in equity cases was reserved. The agreed order further provided that appellee shall pay into court, in satisfaction of the claims and cost of the action, such a sum as might be required after the payments from the Government shall have been exhausted (Record, p. 12, etc.).

The appellants duly filed their itemized claim with the special master. The items are omitted in the printed

record by stipulation (Record, p. 139). The special master allowed the claim, except certain items therein (Record, p. 14). Appellee filed exceptions to the master's report allowing the claim (Record, p. 78, etc.). The exceptions were sustained and the entire claim was denied (Record, pp. 86-89). Appellants prosecuted an appeal (Record, p. 88) and the Circuit Court of Appeals affirmed the decree (Record, pp. 121, 122), though upon grounds different from those taken by the lower court. Appellants prayed an appeal to the United States Supreme Court (Record, p. 130) and filed their assignment of errors (Record, p. 133).

The circuit court denied appellants' claim upon the ground that appellants were not subcontractors, but were successors of the contractors, and that, therefore, their claim is "for supplies furnished to themselves by themselves" and not a claim for materials and labor "supplied to Willard & Cornwell or to either member of that firm." (Record, p. 99.) This construction is based upon the contract of June 2, 1903, between appellants and Joseph Coyne (Record, p. 90). In fact, the whole case turns upon the construction of that contract.

The Court of Appeals affirmed the case upon entirely different reasons. That court held:

First, that appellants were not subcontractors in the sense of supplying labor and materials to Willard & Cornwell, or Coyne, *but were mere lenders of money to Coyne.*

Second, that a party lending money to be used in procuring labor and materials can not recover on the contractors' bond, even though the money be actually used for the purpose for which it was loaned.

Third, that even if appellants be deemed subcontractors, they were only subcontractors for a fixed price, to-wit, the amounts which the United States might owe for the work and the free use of Coyne's machinery.

Fourth, that the appellants have been paid that fixed price.

Fifth, that the reserve of $8,176.75, held by the United States on June 2, 1903, and referred to in the contract as "about $8,300.00," was properly allowed to the ap-

pellee, who, as surety, was, by the decree, charged with $13,261.76 to cover claims of other parties who had supplied labor and materials to Coyne. The court puts that ruling upon the ground that appellants were not subcontractors, but lenders of money, and upon the further ground that the surety was charged with claims for labor and materials furnished prior to the contract of June 2, 1903, and that the assignment of the fund, by the contract, was subordinate to the surety's equity to have that fund applied so as to relieve the surety, *pro tanto,* from its liability established by said decree.

SPECIFICATION OF ERRORS RELIED UPON.

To the decree of the Circuit Court of Appeals, the appellants assigned errors in substance as follows (Record, p. 133):

That the court erred—

(a) In adjudging that, in performing the contract of June 2, 1903, between appellants and Joseph Coyne (Record, p. 90, etc.), for the completion of lock and dam No. 4, appellants did not supply said Coyne with "labor and materials in the prosecution of the work."

(b) In adjudging that, in supplying said labor and materials, appellants were not subcontractors, but were lenders of money.

(c) In adjudging that appellants undertook to complete said work for the amounts that might be paid by the United States and adjudging that said sums have been paid to appellants.

(d) In adjudging that the reserve of $8,176.75 held by the United States was not lawfully assigned to appellants—though the assignment was for the purpose of procuring the completion of the work—and in adjudging that the circuit court properly allowed said sum to appellee to be applied in reduction of $13,261.76, the amount of claims of other parties who had furnished to said Coyne labor and materials in the work.

(e) In affirming the decree of the circuit court denying appellants' claim of $32,757.34 for labor and materials supplied by them to Joseph Coyne in the completion of said work.

BRIEF OF ARGUMENT.

ARE APPELLANTS ASSIGNEES OR SUCCESSORS OF THE CONTRACTORS?

In its exceptions to the master's report, appellee contended that appellants "are the assignees and successors in beneficial interest to said Government contract, etc." (Record, p. 83); and this is the contention which the *circuit court* sustained (Record, pp. 101-2). The Court of Appeals ignored that view and decided that appellants were mere lenders of money to Coyne (Record, p. 128). We will first consider the finding of the Circuit Court.

Bouvier defines successor as "one who follows or comes into the place of another." We take it that to constitute appellants the assignees or successors of Coyne, they must have taken his place in the Government contract—they must have secured the absolute, lawful title to the contract which, by Act of Congress, was not assignable (U. S. Rev. Stat., Sec. 3737). If appellants bought the contract, they would unquestionably have become entitled to all profits that might have been realized from the contract. But they could not receive all the profits when their contract with Coyne limits them to reimbursement for their advancements and to "an agreed compensation of 15 per cent. upon the total cost of completing said contract." Such a limited reimbursement and compensation are wholly inconsistent with the theory that appellants were becoming the absolute assignees of the Government contract.

Suppose there had been a profit, after appellants had been reimbursed for all their advancements and had been paid their 15 per cent., and suppose this controversy was between appellants and Coyne over those profits, it is clear that Coyne would be awarded the profits. Because, forsooth, there was a loss, instead of a profit, is no reason for placing a different construction upon the contract.

Moreover, the contract further shows that appellants never acquired the ownership of the Government contract:

(a) Because if Coyne had been selling his contract he

would have made a bill of sale of it and would not have stipulated to pay appellants their expenditures, plus 15 per cent. for their services. That provision alone is sufficient to show that Coyne was not selling the Government contract.

(b) Because the contract recites that it is a valued asset to *Coyne* if the work can be completed, also that *Coyne* is in imminent danger of losing the profits *which may be earned,* as well as the reserve actually earned; also that "for the purpose of preventing the forfeiture of said contract (he) has made overtures to said Hardaway & Prowell to take up said work and complete it, and the said Hardaway & Prowell have agreed to do so," etc., etc., thus showing that Coyne intended to retain the Government contract. He certainly would lose "the profits which may be earned" if he was selling the contract; and would by the sale defeat the very purpose of making the contract.

(c) Appellants agreed "to take up said work and complete it;" "to superintend the completion of said lock and dam No. 4;" "to furnish the necessary finances for the completion thereof;" "to put in charge of said work a competent superintendent and to properly organize the work for an energetic prosecution thereof to completion, etc.;" "for which services they are to receive an agreed compensation of 15 per cent. upon the total cost of completing said contract," etc. If appellants had been buying the Government contract, none of these provisions would have been inserted—they would have been useless and inapplicable.

We perceive no difference between this agreement and one to take up and complete the work for a fixed, lump sum, so far as becoming subcontractors are concerned. It is certainly creating a subcontract to engage a party to finish the work, whether for a lump sum or for the cost of completing it and 15 per cent. commissions. The mere method of payment is immaterial in determining whether it is a subcontract or not. Agreeing to pay the cost of the work, plus 15 per cent., instead of a lump sum, does not destroy the subcontract feature of the arrangement. This is one of the points decided in Tennis Bros. Co. v. Wetzel & Tyler R. Co., 145 Fed., C. C. A., 458.

The master construed the agreement of June 2, 1903, as a subcontract.

The Circuit Court decided that it was a sale and assignment of the contract.

The Circuit Court of Appeals held that it was neither—that it was making appellants mere agents and *lenders of money* to Coyne. We think the master was right in denominating appellants as "subcontractors," but it is not material to decide what they were technically; for this court has declared in Hill, etc. v. American Surety Co., 200 U. S., 197, that the language of the statute *"looks to the protection of those who supply the labor or materials provided for in the contract and not to the particular contract or engagement under which the labor or materials were supplied."* (Our italics.)

We contend that the transfer of the Government funds was intended as a mere *security* for appellants, and it was so stated as to the reserve (Record, p. 90, etc.), and the providing for the application of the funds was to protect Coyne against any liability to the Government, or to laborers and supply men. Such a provision is not unusual where the work is sublet.

There are three significant provisions in the contract, to-wit—one, that the reserve is transferred for *"securing"* to appellants all sums which they shall necessarily have to pay on whatever account for the completion of the lock and dam; a second, for the payment of the 15 per cent. compensation of appellants; and a third, for the payment of any balance unexpended to Coyne. These clauses show that Coyne was not selling or assigning his contract; that these clauses would be inapplicable if the contract of June 2, 1903, were a bill of sale of the Government contract; that appellants were to be repaid their expenditures; that they were to be limited to receiving their expenditures and compensation, and that Coyne, not appellants, should receive whatever surplus might remain after the advancements and the expenditures and compensation shall have been repaid to appellants.

Upon the question of whether appellants were either purchasers of the contract or were lenders of money to Coyne, or were subcontractors, the case of Tennis Bros.

v. Wetzel & Tyler Railway Co. (140 Fed., 193, affirmed in 145 Fed., 458) is in point. In that case the plaintiff asserted a mechanic's lien, under the law of West Virginia, which is in part as follows:

> "Every workman, laborer or other person who shall do or perform any work or labor, by virtue of any contract, for any incorporated company doing business in this State, shall have a lien for the value of such work or labor upon all the real estate and personal property of said company," etc.

The contract required Tennis Bros. to "supervise" the work; in the case at bar appellants agreed to "superintend" it. Tennis Bros. agreed to "employ and pay for all labor" and "to render bi-weekly bills" therefor, while Hardaway & Prowell stipulated "to take up said work and complete it" and "to furnish the necessary finances for the completion" of the contract. Tennis Bros. were to receive 10 per cent. on the cost of the work for their services, and Hardaway & Prowell were "to receive an agreed compensation of 15 per cent. upon the total cost of completing said contract." The Court of Appeals, Fourth Circuit, in the above case held that "to supervise the construction of a street-car line . . ." is to perform "work or labor," "and the person so rendering the same is entitled to the benefits of the mechanic's lien law of West Virginia," etc. This is supported by the authorities.

> Flagstaff v. Cullins, 104 U. S., 704;
> Central Trust Co. v. R. N. I. & B. R. R. Co., 54 Fed., 728, C. C. A., Sixth Circuit.

In the Tennis Bros. case the court say that the contractor is entitled to the lien, where he is to be paid a percentage on the cost of construction, the same as he would be if a fixed sum is to be paid him. As the reported case does not set forth the contract in full, we here insert it, as follows:

"This memorandum of agreement, made this 15th day of April, A. D. 1903, by and between Tennis Brothers Company, a corporation, of Pittsburgh, Pa., hereinafter referred to as the party of the first part, and Wetzel & Tyler Railway Company, a corporation, having its principal office in the city of Pittsburg, hereinafter referred to as party of the second part,

"Witnesseth: That for the respective and mutual covenants, obligations and considerations hereinafter contained, the said parties hereto have agreed together as follows:

"(1) The party of the first part agrees to supervise construction for party of the second part of an electric railway connecting the town of Brooklyn and city of Sistersville, West Virginia, and through the streets of said town and city, as may be directed by party of the second part, including extension through town of New Martinsville, if required by said second party.

"(2) The party of the first part agrees to furnish such of his own services of his general engineering and office force as may be necessary to efficiently and promptly construct said electric railway, including expenses connected with said services.

"(3) The party of the first part agrees to obtain proposals from manufacturers for supply of all materials necessary for the construction of said electric railway, to endeavor to obtain the lowest prices, and to submit the same to the supervising engineers of the party of the second part for approval.

"(4) The party of the first part agrees to supply all tools necessary for the construction of said electric railway, excepting locomotive or electric construction car.

"(5) The party of the first part agrees to employ and pay for all labor necessary in the construction of said electric railway, and to render bi-weekly bills at cost for said labor to party of the second part.

"(6) The party of the first part agrees to observe the (15) general conditions hereto attached, marked 'Exhibit A,' and the same are hereby made part of the contract. The word 'contractor' in said general conditions shall be taken to refer to the party of the first part, and the words 'supervising engineer' in said general conditions shall be taken to refer to the supervising engineer or engineers of the party of the second part.

"(7) The party of the first part agrees not to order any materials without authority in writing from the party of the second part, or the supervising engineers, and that all orders for material shall be in the name of the party of the second part.

"(8) The party of the first part agrees to follow the general and specific directions of the supervising engineers and their representatives on the work, as said directions shall be issued either in writing or verbally.

"(9) The party of the second part agrees to furnish all materials and supplies for the construction of said electric railway, excepting tools, which the party of the first part shall supply.

"(10) The party of the second part agrees to reimburse the party of the first part at cost to it for moneys expended for labor, upon submission of bi-weekly bills with pay-rolls attached bearing the approval of the supervising engineer.

"(11) The party of the second part agrees to pay to party of the first part as payment in full for all services included in this agreement the sum of ten per cent. (10%) on the actual cost of all materials and labor necessary for the construction of said electric railway, said ten per cent. (10%)to apply on the following items: 1. Grading and drainage. 2. Bridges, culverts and trestles. 3. Paving and ballast. 4. Girder and tee rails, special work, poles and spikes. 5 Poles, ties, fences and cattle guards. 6. Trolley and feeder wires. 7. Overhead wire work, including span guard, and guy

wires, eye bolts, insulators, pullovers, switches, strain insulators, cross arms and pins, lightning arresters, section insulators, and all labor necessary for complete erection of above ready for operation.

It is agreed that the first party shall receive one-half of the compensation herein provided for in bonds at 90, said bonds to be a part of issue of $300,000, 30-year five (5) per cent. gold bonds, secured by a deed of trust upon the said road, its equipment and franchises, said deed of trust to be the first lien upon the said property.

"(12) It is mutually understood and agreed that this agreement does not apply to rolling stock, electric car equipment, power house and contents, real estate or buildings.

"(13) Party of the first part agrees to obtain and furnish indemnity insurance in company to be approved by party of the second part, covering all claims for injuries, personal or otherwise, to employes of party of the first part, and to hold the party of the second part harmless from suits for damages occasioned by accidents occurring during construction of said electric railway.

"In witness whereof, the party of the first part has caused this agreement to be signed and attested by its officers duly authorized thereto, and the party of the second part has signed this agreement in the presence of witness.

"TENNIS BROTHERS COMPANY (Corp. Seal),
"By Wm. C. Tennis, President.

"Attest: M. F. TENNIS, Secretary.
"WETZEL & TYLER RAILWAY CO.
"By John P. Gangwisch, Jr., President."

We, therefore, contend that appellants were subcontractors and not assignees of the Government contract.

WAS IT A LOAN OF MONEY?

The Court of Appeals said:

> "If, as contended, there is an implied agreement to reimburse every outlay by Hardaway & Prowell in completing this work, is it more than an implied agreement to repay the money advanced under this contract to 'furnish the necessary finances' to complete the job?" (Record, p. 127.)

The court then held that appellants were mere agents of Coyne, advancing money to him but supplying no labor and materials, and concluded that appellants can not recover on the contractors' bond for money loaned to Coyne (Record, pp. 129 and 130).

It is important to note that appellants' claim is entirely for labor and materials. The court's construction leaves out of view those clauses of the contract which apply to the claim for labor and materials and rests the decision upon a clause which relates solely to advancements made for purposes other than labor and materials *supplied by appellants.* It treats the contract as if it contained no provision except the one to advance money. What we mean is this: The contract contains one provision for advancements of money and another provision for the supplying of labor and materials; yet the Court of Appeals regarded the supplying of labor and materials as though it were advancing money. The contract shows that appellants were expected to do two things: 1st, to advance money for purposes other than the supplying of labor and materials; 2d, to supply labor and materials and to go in debt in so doing. Let us prove this: Section 4, clause 2, provides that appellants shall be repaid "all moneys advanced by Hardaway & Prowell and used in the prosecution of said work" (Record, p. 124); and section 4, clause 3, provides for repaying "all debts necessarily incurred by the said Hardaway & Prowell for the prosecution of said work other than debts for labor and material."

Section 4, clause 4, requires that appellants shall be repaid . . . "moneys *advanced* by them in payment of labor and material debts."

On the other hand, section 4, clause 4, provides for repaying "all debts *incurred* by said Hardaway & Prowell for labor and material," etc., and section 5, clause 1, also provides for repaying "all debts for labor and material *incurred* in the building of said lock and dam."

Please note the words "moneys advanced." To pay one's own debts is not to advance money. But to furnish the money for the debts of another is to advance it. Consequently, when appellants agreed to *advance* the money in payment of labor and material debts, that could only mean the debts of Coyne. When the debts of appellants are contemplated, they are specifically designated as "debts *incurred* by said Hardaway & Prowell," etc. Thus it appears that the parties had in mind, as different or distinct things, "moneys *advanced*" and "*debts incurred*" by appellants. But the Court of Appeals treated "*debts incurred* by Hardaway & Prowell for labor and materials" as if they were the same as "*moneys advanced* in payment of labor and material debts" *previously* incurred by Coyne. The parties certainly intended to make a distinction between *advancements* and *debts*. A practical demonstration of this is the fact that appellants did advance the money therefor and did pay the pay-roll of the laborers for May, 1903, the month immediately preceding the execution of the contract. But the master disallowed that item upon the ground that it was a mere loan to Coyne. The labor for that month was furnished by contract between the laborers and Coyne, and, of course, appellants did not supply that labor, hence their advancement of the money for the pay-roll for May was of necessity a loan. Appellants could not be said to have supplied labor which had already been supplied under an agreement between the laborers and Coyne, to which agreement appellants were not parties.

Again, section 4 of the contract transfers funds to be applied to certain purposes "*preferentially in the following order.*" In that "order" "*moneys advanced*" are mentioned second and *debts incurred* by appellants for labor and material are mentioned fourth. Now, the parties would never have created a preferential order for satisfying claims unless those claims were different in their characters. If all

the claims were to be deemed advancements, as the Court of Appeals apprehended, there was absolutely no reason for naming them separately in the contract and providing for the order in which they should be paid.

Under the ordinary rules of construction some meaning must be given to every clause of the contract and, if all the clauses of section 4 are construed to refer to advancements, then all those clauses, except clause 2, will be construed out of the contract.

Can these different clauses mean the same thing, and that same thing held to be advancements? If not, then the Court of Appeals erred in holding that the "debts incurred by Hardaway & Prowell for labor and material" were loans to Coyne.

It is difficult to conceive a loan of money to Coyne when he never received the money and when it was not paid out by him, nor upon his debts, nor upon his orders, and was in no way subject to his control.

But the Court of Appeals said:

> "Now, if Hardaway & Prowell are to go on as mere subcontractors and finish the work, supplying the necessary labor and materials and receiving an agreed consideration for the work, why this explicit agreement to furnish the necessary finances to complete the work?
>
> "Especially is this significant in view of the fact that there is no agreement that they shall supply the necessary labor and materials to finish the work."

Let us consider the first sentence in the above quotation. The contract contemplated that appellants should obtain the acceptance of the work by the Government. Coyne had no money for the payment of labor and material claims, which he had incurred to different parties; he believed that appellants would have to pay some expenses in obtaining the acceptance of the work and he desired to have his obligations to laborers satisfied at once. He knew that money would have to be advanced by appellants for the above purposes, as he was himself insolvent, and the

provision for furnishing the necessary finances was inserted to cover those purposes.

As to the second sentence in said quotation, the court is in error in saying that there is no agreement that appellants shall supply the necessary labor and materials. Appellants expressly agreed "to take up said work and complete it." In the absence of some language changing the ordinary meaning of those words, they necessarily include the doing of everything necessary to effect the result, including the supplying of labor and material necessary to the completion of the work. Besides, it was contemplated that, in taking up and completing the work, appellants should supply the labor and materials. This is shown by more than one provision:

First—Coyne certainly was not to supply them. He expressly agreed not to interfere in any way with the work.

Second—It was agreed that Coyne should pay appellants 15 per cent. upon the total cost to be expended by them in finishing the lock and dam and making settlement with the Government and obtaining its acceptance of the work (section 1 of contract). This necessarily shows that it was intended that appellants should incur the cost of completion. Surely labor and materials were necessarily part of that cost.

Third—This view is further reinforced by section 4, which attempts to provide a mode of payment for debts incurred by appellants for labor and materials, while, by section 5, Coyne attempted to secure all amounts that they (appellants) shall have to pay for the completion of the work, and that provision too was intended to include debts for labor and materials, as is evidenced by clause 1 of section 5, as well as clause 4 of section 4.

If it was not agreed that, in finishing the work, appellants should furnish the labor and materials, Coyne would never have made provision for securing or paying for that labor and material. Therefore, we insist that the Court of Appeals was mistaken in saying that there was no agreement that appellants should supply the labor and materials. It would have been impossible for appellants "to take up said work and complete it" with-

out supplying the necessary labor and materials, and it would have been very queer, indeed, for Coyne to agree to secure or pay appellants' debts for labor and materials unless it was expected that those debts should be incurred.

If we look for the direct provision, authorizing appellants to supply the labor and materials, we can not find it in the requirement to furnish the necessary finances for the completion of the work. That is to say, the obligation to furnish money could not be construed to mean that appellants would engage the labor and materials. The two obligations are vastly different. But the obligation "to take up the work and complete it" undoubtedly includes the obligation to procure the labor and materials and, in fact, to do whatever is necessary to accomplish the result which was agreed to be accomplished. Consequently, we submit that the labor and materials were not supplied and could not have been supplied under the clause for furnishing money. Under the construction by the Court of Appeals, no distinct meaning is given to the words "debts incurred by said Hardaway & Prowell, etc," as contradistinguished from the words "moneys advanced by Hardaway & Prowell, etc." We have seen that each expression was intended to serve a different purpose.

It seems to us that the contract means that appellants should, *with their own money or on their own credit*, procure the labor and materials for this work. Therefore, it can not be said that they loaned money to Coyne, or that they even loaned credit to him; for to loan credit is to guarantee a debt which Coyne is primarily obligated to pay; or, in other words, to endorse for Coyne.

Somebody supplied this labor and material. Coyne did not. In fact, it was contemplated that appellants should supply them and would go in debt to do so. The labor and materials were obtained by appellants' credit, not credit loaned to Coyne, but their credit with the laborers and materialmen. If appellants loaned no money and no credit to Coyne, they must of necessity have supplied him with the labor and materials.

It is the policy of the law to look to the substance of

the transaction, not to mere technicalities; or, as said by this court in U. S., for use, etc. v. Am. Surety Co., 200 U. S., 197, to look

> "to the protection of those who supply the labor and materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied."

The substance of this transaction undoubtedly was the supplying of labor and materials by appellants. It is not even called an advancement in the contract, but "debts incurred by the said Hardaway & Prowell for labor and material." But we submit that this court will look to see what it really is—not what it is called—and, if it is found that it is the supplying of labor and materials, the appellants will be awarded a judgment. *Prima facie* appellants' right to recover is clear; the burden is upon the surety to overcome this *prima facie* case by showing that the parties made a contract wholly inconsistent with the *prima facie* case; and before holding that the contract does override the presumption of liability we apprehend the court will require clear and unambiguous language. No such language can be found in the agreement. The reasoning of the Court of Appeals on this point is entirely insufficient. For example, the court said:

> "In short, is not the agreement one by which the appellants are to supply the money and superintend its expenditure, this supervision enabling them to protect themselves against diversion?"

This inquiry arises from an erroneous deduction from the facts, inasmuch as there was no agreement to supply the money *for the labor and materials*, but to supply the labor and materials themselves.

But the court's words are demurrable. They do not state facts sufficient to constitute a defense to appellants' claim. An ordinary subcontractor would be entitled to recover from the chief contractor or his surety on just

such a state of facts as the court gave in the above quotation. In short, that quotation states in substance precisely what an ordinary subcontractor undertakes to do. A subcontract to take up and complete the work means that the subcontractor will "supply the money and superintend its expenditure." Consequently, the agreement to supply the money and "take up and complete the work" is no more nor less than a naked agreement to take up and complete the work. The words "to supply the money" are mere surplusage or redundancy, adding nothing to the substance of the requirement contained in the stipulation "to take up and complete the work."

The Court of Appeals says " . . . that there is no agreement that they shall supply the necessary labor and materials to finish the work." Nevertheless, the court most inconsistently held that the supplying of that labor and material was a loan of money *under the contract.*

Yet, if it were decided that there was no requirement in the contract that appellants should supply the labor and materials, their right to recover would still be clear; for, without an express agreement, Coyne and his surety would be liable under an implied promise to pay for labor and materials supplied at Coyne's request and accepted and partially paid for by him.

We, therefore, respectfully submit:

1st. That appellants supplied to Coyne the labor and materials allowed by the master.

2d. That the supplying of the labor and materials was not a loan of money to Coyne.

3d. We shall later endeavor to show (although we deem it unnecessary to do so) that money loaned to a contractor to be used in the procurement of labor and materials and actually used for that purpose is in effect the supplying of labor and materials and the contractor and his surety are liable therefor.

SUPERINTENDING THE WORK IS PERFORMING LABOR.

The contract expressly bound appellants, among other things, "to superintend the completion of the said lock and dam," etc., for which they were "to receive an agreed

compensation of 15 per cent. upon the total cost of completing said contract," etc., etc.

In Tennis Bros. & Co. v. W. & T. R. Co., 145 Fed., 458, the subcontractor agreed to employ the laborers, to advance the money and pay them and to "supervise" the work for a fixed compensation of 10 per cent. The court held "supervising" the work was performing labor and entered a judgment establishing a mechanic's lien for the 10 per cent, under the West Virginia statute.

The Court of Appeals, to be consistent, should have directed a judgment for the 15 per cent. compensation in any event. Even if the money expended for labor and materials be deemed a loan, the superintending of the work was not a loan, and, therefore, the item of $7,556.00, with interest, allowed by the master, as the 15 per cent. compensation of appellants should have been allowed by the court. Prowell in superintending the work performed some manual labor (Record, p. 48). There is no contradiction of this evidence. But even if he had performed no manual labor, his superintending the work was supplying labor.

Flagstaff v. Cullins, 104 U. S., 704;
Cen. Trust Co. v. R. N. I. & B. R. R. Co., 54 Fed. 728 (C. C. A., 6th Cir.);
Tennis Bros. & Co. v. Wetzel, etc., 140 Fed., 193, affirmed in 145 Fed., 458.

MONEY LOANED TO A CONTRACTOR TO BE USED IN PROCURING LABOR AND MATERIALS, AND SO USED, MAY BE RECOVERED FROM THE CONTRACTOR'S SURETY.

Suppose appellants technically became lenders of money. The fact is proven and not disputed that the money was used for obtaining labor and materials as was intended (Record, p. 18). All other items were disallowed by the master.

This court impliedly conceded in Prairie State National Bank v. U. S., 164 U. S., 227 (an action arising under the same act as is here involved) that where money is loaned for the procurement of labor and materials and is used

for that purpose, it is the same in effect as if the labor and materials are directly supplied by the party lending the money. In that case the bank advanced money to the contractor and, to use the words of this court:

> "It was claimed by the bank that the amount of the advances in question were, in large part, actually used in the performance of the contract of Sundberg & Co. The Court of Claims failed to find such to be the fact."

This we construe as an implied holding that if the funds had actually been used in the work, the surety of the contractors would be bound. The same doctrine was conceded in Henningsen v. U. S. F. & G. Co., 143 Fed., 812, C. C. A. There a bank had loaned money to a contractor ostensibly for use in performing a Government contract, and the Court of Appeals found that:

> "It does not appear that the money loaned to Henningsen (the contractor) by the bank was loaned upon the agreement on his part to use it in the performance of the contract in question, nor does it appear that as a matter of fact it was so used."

The purpose of the statute is to give some security to persons supplying labor and materials for Government work. The form of the contract by which the labor and materials reached the work is held by this court (Hill, etc. v. U. S., *supra*) to be immaterial; and, where money is loaned for the procurement of labor and materials and is used in that way, the paramount object is obtained. What possible reason could exist for giving redress to A, who procured labor and materials, and denying redress to B, whose money is loaned and used for the purpose of procuring labor and materials? If such distinction is drawn, there ought to be some sound principle of law or equity upon which to base it. We are unable to imagine such a principle. The surety is not prejudiced by rejecting that distinction and there is no reason for establishing a rule which would diminish the liability which

the surety voluntarily and generally for compensation assumes.

Let it be noted that we are not discussing a general loan, nor one under which the contractor may elect whether he will apply the money to procure the labor and material, but a loan so guarded that the money must be used exclusively for that purpose.

Suppose a subcontractor's surety is compelled to pay the party who supplied the materials, he, the surety, would be subrogated to the right of the person supplying the materials to proceed on the contractor's bond. If, instead of lending his endorsement, he lends the money to procure the materials, and it is used for that purpose, why should he still not have the right to hold the contractor's surety? In both cases the materials are procured for the work and there ought to be no difference in liability because of difference in the mere form or method of procuring them, whether by loan of money or by the loan of credit or endorsement. The fact that the party lending the money or the endorsement enabled the contractor to obtain the materials was a benefit rather than an injury to the surety on the contractor's bond, for it enabled the contractor to comply with the contract with the Government, for which the surety was bound.

No cases arising under the statute here involved are cited against our contention.

The Court of Appeals cites three cases for the ruling that persons who loan money to a contractor may not recover from the contractor's surety.

With due deference, we suggest that two of those citations are irrelevant and the third inferentially supports the contrary view. They were not cases where the money was loaned and used only to procure anything for which the law gives a lien or preference, but were cases where loans were made to pay for articles previously purchased. Hence the lender could not be said to have supplied those articles.

In Morgan's La., &c., Ry. Co. v. Texas. C. Ry., &c., 137 U. S., 171, and U. S. Trust Co. v. Western Con. Co., 81 Fed., 454, the court held that money loaned on general account to a railroad was not furnishing labor and ma-

terials for keeping it in operation, and consequently the court refused to displace the priority of bondholders. There is no similarity of facts upon which the right to recover was asserted in those cases to the facts in the case at bar. There the money was loaned for general purposes, principally for the payment of debts, and was intended as mere loans, while in the case at bar the fund was in no sense a loan, or, if a technical loan, it was made for the express purpose of procuring labor and materials and was so used, and could not possibly have been applied to any other use.

In the other case cited (Theobald v. Hammond, 133 Fed., 425, C. C. A., Sixth Circuit), Theobald procured the loan of money to the bankrupt by furnishing the security upon which the loan was made. The court said:

> "There was no agreement between Theobald and the bankrupt that the money should be so used (in paying labor claims); nor was there an agreement between them that the security or priority incident to the labor claims should pass to Theobald and be operative in his favor."

Hence the court adjudged that Theobald was not entitled to the priority given to laborers by section 64b (4) of the Bankruptcy Law. The implication of even this decision is that if there had been an agreement that the money should be used in discharging labor claims, Theobald would have been entitled to a preference. It certainly is not an authority against our contention.

This court has held that the construction placed upon an ambiguous contract by the parties is an aid which may always be called in. Knox County v. Ninth Nat'l Bank, 147 U. S., 100. The parties manifestly construed the contract to mean, not that Coyne would borrow the money and use it in the work, but that appellants themselves would procure the labor and materials in their own names; and this is precisely what they did.

APPELLEE CITES IRRELEVANT CASES.

United States v. Rundle, 107 Fed., C. C. A., is cited and incorrectly stated by appellee. A contractor arranged to borrow from the Fidelity Bank money to carry on the work. The contractor gave each laborer a time check and endorsed on each time check the words "Fidelity Bank please pay." The bank paid these checks. Held, a mere loan of money and the orders, in effect, checks on the bank.

Besides, in that Rundle case the only issue tried was one of fact, namely, whether the laborers had assigned their wage claims to the Fidelity National Bank; and the court found that no such assignment was made. The whole case turned on that issue.

In the Rundle case the contractor himself employed the laborers and gave them checks on the bank in payment of their wages; therefore, he supplied the labor to himself.

In the case at bar the appellants—not Coyne—engaged the labor and materials, upon their own credit and in their own names; therefore they supplied the labor and materials to Coyne.

If appellants agreed with Coyne that, in their own names and upon their own credit, they would procure labor and materials and supply them to the work (or to Coyne, which is the same thing), what were they required to supply—money, or labor and materials? That is exactly this case. In the Rundle case the bank did not, with its own money or upon its own credit, employ the labor or supply it to the work. When the checks on the bank were paid the labor had already been supplied. Judge Ross wrote the opinion in the Rundle case, 107 Fed., 227, and in the Henningsen case, 143 Fed., 812. In the later case he twice mentioned the Rundle case; and if he had intended, by the Rundle case, to hold that money advanced and used in the procurement of labor could not be recovered from the surety, then he would never have ruled to the contrary, as he did in the Henningsen case. This Henningsen case was decided after the decision in Prairie State Bank v. U. S., 164 U. S., 227,

and Judge Ross knew of that Supreme Court decision from which we have above quoted, for in the Henningsen opinion he cites the Prairie State Bank case, though on a different point.

United States v. Kimpland, 93 Fed., 403. Held, that boarding the laborers is not supplying labor for the work.

The cases of Steamboat James v. Waring, 39 Ala., 180, and Chapman v. Abraham, 61 Ala., 108, are wholly irrelevant. To lend money to pay for labor and materials already *supplied by others* is not supplying that labor and materials. Such is the meaning of the authorities cited by the Court of Appeals and appellee.

In none of those authorities does it appear that the right to a lien would be denied, where the money was both loaned and used exclusively for procuring labor and materials. There is a sound reason for the distinction we contend for. Where the labor or materials are furnished under a mechanic's lien law, the parties furnishing them are entitled to perfect a lien. If the contractor borrows the money and discharges the claims, of course the claimants, who alone could perfect the lien, would be satisfied and their right to a lien would be extinguished. Only after perfecting the lien could they even assign it. They could not assign it to the contractor who paid them, but might, after perfecting, sell their claim, with the lien, to a third party. If a contractor borrows money to pay for labor, but uses the money for other purposes, it would not be said that the lender furnished the labor. The laborers, or the contractor who employed them, not the lenders of the money, would have furnished the labor. On the other hand, if, instead of lending money to the contractor, a third party employs and pays the laborers, he clearly is "supplying" labor. That is what appellants did. Loaning money to a contractor to pay for labor or materials *previously furnished* could not be deemed furnishing the labor or materials.

The only case we could find (besides the two above cited) upon the distinction we contend for, is Evans v. Lower, 58 Atl., 295 (New Jersey). In that case the contractor became insolvent and his surety "bought for him,

or agreed to be responsible for, the labor and materials afterwards used in the completion of the job." The court held that:

> "For such labor paid and for the materials furnished the sureties stood as any other person so furnishing labor and materials," etc.

WERE APPELLANTS SUBCONTRACTORS FOR A FIXED PRICE TO BE LIMITED BY AMOUNT OF GOVERNMENT CHECKS?

Ordinarily, where one supplies labor and material at the request of another, without an express promise to pay for them, the law implies a promise to pay their reasonable value. This reasonable value is the legal measure of the amount to be paid.

If, therefore, the written contract between appellants and Coyne does not expressly, or by fair implication, provide an inconsistent measure of payment, Coyne would be bound to pay appellants the reasonable value of the work and materials supplied by them at his request. This would include, first, their reasonable outlays for labor and materials, and, secondly, reasonable compensation for their own services.

Now, this is substantially what the written contract contemplates, save only that the compensation for the appellants' own services is fixed at "15 per cent. upon the total cost of completing said contract." This percentage, in the absence of proof to the contrary, would be presumed reasonable; nevertheless, it is affirmatively shown by the uncontroverted testimony (Record, p. 51). In short, according to our construction of the contract, Coyne is bound only to do what the law justly presumes is a reasonable and just thing to do, namely, to repay the appellants for labor and materials furnished for his benefit and at his request and also to pay them a reasonable compensation for their own services.

The significance of this statement lies in the fact that the lower court, as a reason for its construction of the written contract, considered that any other construction

would work a hardship upon Coyne. We believe we can make plain the fallacy of this reasoning.

The contract does not expressly say whether Coyne shall or shall not be bound to repay the appellants in full for the "amounts necessarily expended and expenses incurred for labor and materials." Hence the application of the legal presumption that Coyne did promise to repay them, unless something inconsistent with the presumption appears in the contract.

It should be observed, on the other hand, however, that the contract does expressly say that for their own services "they are to receive an agreed compensation of 15 per cent. upon the total cost of completing said contract," which amounts to an express promise on Coyne's part to pay that amount. The controversy, therefore, is really limited to the question of payment in full for labor and materials supplied. In passing, it may be remarked that it would seem strange if the contract intended that Coyne is bound to pay for appellants' services in full in any event, but is not bound to pay their outlays for labor and materials incurred for his benefit and at his request.

We now purpose briefly stating our own view of the meaning of the language of the contract and then replying to the arguments of the Circuit Court of Appeals touching the question of Coyne's liability to pay appellants in full for labor and materials supplied.

To avoid needless use of words, when we shall hereafter refer to appellants' expenses paid and incurred for labor and material, we shall call them "outlays."

Again, there are two funds mentioned in the contract as applicable to the payment of appellants. The first consists of the checks which they are to receive from the Government as their work of completion progresses. For brevity we shall hereafter call that the "check fund." The second fund consists of the reserve of about $8,300.00 earned by Coyne but held by the Government until the completion of the work. This we shall call the "reserve fund."

The contract is rather loosely drawn, but it is manifestly its object to provide, and the parties to it evidently understood that the appellants, Hardaway & Prowell, using

Coyne's plant, were, at their own expense, to furnish the necessary labor and material to complete the work. The contract recites that:

> "Coyne is in imminent danger of losing, not only what profits may be made from the completion of the work, but the entire reserve fund also, retained by the Government, and . . . for the purpose of preventing the forfeiture of said contract, has made overtures to said Hardaway & Prowell to take up said work and complete it."

Appellants, Hardaway & Prowell, agreed to do this and did it.

Coyne agreed "not to interfere with them in any way in the prosecution of said work." They agreed to "furnish the necessary finances for the completion thereof," "to put in charge of said work a competent superintendent," "to properly organize the work for an energetic prosecution thereof to completion," and "to superintend the completion."

These were the things and all the things which the contract in terms required of the appellants. We submit that they are just what a subcontractor usually assumes to do. Whether he undertakes a part or the whole of the work of the original contractor, what he usually does is to furnish the labor and material required, at his own expense, and to organize, superintend and complete the work. That is what appellants agreed to do and did. They have relieved Coyne and his surety of all liability to the United States.

Does the language of the contract affirmatively overcome the legal presumption of a promise by Coyne to repay the full "amounts necessarily expended and expenses incurred" by appellants in this undertaking? If so, it must be by implication, for there is no word in the contract expressly relieving Coyne of this obligation, nor any which we can find inconsistent with it.

It is true that two funds (which have proven inadequate) were assigned by Coyne to be applied towards this repayment; but no word in the contract says or, as

we think, indicates that appellants are to look exclusively to these funds for reimbursement for their necessary outlays for labor and material. Certainly their percentage was not limited to these two funds, for, as we have seen, the contract expressly provided that they should receive this percentage without any limitation.

As we shall also presently see, appellants could under no circumstances gain more from the undertaking than this percentage, which both presumptively and under the uncontroverted proof is to be taken to be a reasonable one.

To hold that their reimbursement for necessary outlays for labor and material supplied to fulfill Coyne's contract and relieve him of liability under his bond to the Government is to be limited to the two funds, because the funds have been assigned to them to be in part applied towards such reimbursement, would be to destroy by implication the legal and very just presumption of a promise by Coyne to pay them, and would also make appellants assume all the risk of the undertaking without any share in its profits, for, under the contract, all they could receive besides repayment for their necessary expenses paid and incurred in carrying on the work was the 15 per cent. compensation for their own services.

Any surplus of the two funds, or either of them, both their necessary outlays for labor and material and their percentage compensation would, under the contract go, not to them, but to Coyne. The lower court thought otherwise; but, we think, erroneously. It is error, we apprehend, and grew out of the mere misnumbering of a paragraph in the contract.

The contract does, indeed, provide that the two funds (check fund and the reserve fund) shall be applied, among other things, towards the repayment of their outlays, as well as paying the percentage compensation for their services; but there is no provision whatever to the effect that they shall receive more than the amount of their outlays and percentage. Therefore, if there should be an excess of either fund on their outlays and percentage, it would go to Coyne. This is true, whether the contract was silent on the subject or not, for, while the law presumes that Coyne agreed to repay appellants for their outlays for labor

and materials supplied for his benefit and at his request, it would not presume that he was to pay them any part of his profits.

The only thing on the subject is where (following the statement of the order in which the reserve fund is to be applied and preceding the last numbered paragraph of the contract) it says:

"4. Any surplus to be paid to the said Coyne."

To what "surplus" does this clause refer? The language is certainly broad enough to apply to any surplus from either or both funds. Thus construed, if the check fund had been more than sufficient to repay appellants' outlays and percentage, the surplus of those checks, as well as the whole reserve fund, would have gone to Coyne. Unless this be true, Coyne's purpose, expressed in the preamble of the contract, to prevent the loss to himself of "the profits which may be earned," would be defeated.

The only thing which might be taken to militate against this construction of the clause is the numeral "4" preceding it, which, it may be contended, restricts the meaning of the "surplus" mentioned to a surplus of the reserve fund of $8,300.00. Should this, however, be granted, it would show only that any surplus of the reserve fund would go to Coyne, but would not at all show that any surplus of the other fund (namely the check fund) would go to him, but would belong to appellants.

That the surplus of the check fund would go to Coyne is obvious for two reasons:

First, the contract does not say the appellants are to own any surplus above their outlays and percentage, but,

Second, it does expressly say that they shall be paid out of it, to-wit., only their outlays and percentage.

Third, if appellants were entitled to any surplus of the check fund, it was wholly useless to prescribe the order of application of that fund to appellants' outlays, compensation and debts, since they would have applied it to suit themselves.

It, therefore, seems plain that all that the appellants could in any event receive for their undertaking was the

amount of their outlays and 15 per cent. compensation for their services.

Now, in view of this and in view of the absence of any express limitation of Coyne's presumed liability to pay in full for labor and materials supplied to enable him to comply with the terms of his bond to the Government, is it reasonable to set aside this very just presumption and make appellants assume all the risk while Coyne would take all the profits of the undertaking? We think not, yet such is the position of the Court of Appeals.

That court gives several reasons for this position, none of which, we think, this court will find sound.

After first arguing that appellants were not subcontractors supplying labor and materials, but mere lenders of money to Coyne under an agreement to supply all moneys needed to furnish the labor and material required and to superintend, as his agent, the completion of his contract, that court proceeds to take an alternative position, and says:

> "But if this is not a mere agreement to 'finance' Coyne and superintend the disbursement of the money advanced, we are led to the conclusion that, if contractors, they were so only under a special agreement to complete the work with Coyne's plant and his quarry for that part of the original contract price which would be earned by so doing.
>
> "If this proved insufficient to reimburse them, then they might look to the reserve percentage in the hands of the Government, amounting to $8,300.00, to the extent necessary to do that and to pay their commissions, but no further. This view is borne out by a number of considerations" (Record, p. 129).

After discussing these "considerations" (which we shall discuss further on), the court adds:

> "If, therefore, they are to be regarded as subcontractors, they are only such for a fixed price, being the two funds earned by completion and the free use of Coyne's plant" (Record, p. 129).

In other words, because by the contract Coyne assigns his right to the appellants to receive the check fund and the reserve fund and apply them in part to repay themselves their outlays and percentage, the Court of Appeals concludes that the appellants' recourse is restricted to these two funds and, notwithstanding the general rule whereby Coyne would be bound to repay them in full for the labor and materials supplied for his benefit and at his request, he is impliedly released from that obligation! We utterly fail to perceive the sequence. It is a complete reversal of the rule of law.

We shall presently see that one of these funds (the reserve fund) is expressly assigned as "security" for the repayment of appellants' outlays and their percentage, and this security certainly implies an existing obligation to be thus secured. But, waiving this for the present, we submit that the mere assignment and application of the fund towards the payment of an obligation does not itself limit the amount of the obligation to the amount which may be realized from that fund. The application of the fund is a mode of payment, but a mode of payment is a very different thing from the amount of the obligation to be paid.

It is true that where a contract expressly fixed a certain amount to be paid, it may be deemed exclusive of an otherwise presumed amount; (and likewise an expressly provided mode of payment of any given amount may, where such an intention is deducible from the language or circumstances, be held to exclude other modes of paying that amount); but we submit that, without such restricting language or circumstances, a provision for a mere mode of payment, not fixing the limit of payment, will not limit the amount to be paid.

Now, the amount of payment provided by the written contract of the parties in the present case, we submit, is not and can not be other than the amount of appellants' outlays and percentage, and this for several reasons:

1. The *percentage compensation* is expressly contracted to be paid "for their services." Says the contract: "They are to receive an agreed compensation of 15 per cent. upon the total cost of completing said contract" (Record, p. 124).

2. For appellants' outlays for labor and material at

Coyne's request, he is presumed to be bound to pay in full unless that presumption is rebutted by the language of the contract (or by surrounding circumstances, which no one claims to have existed).

3. The contract does not anywhere say that he shall not pay appellants in full.

4. It does not provide that the two assigned funds shall be applied in full payment, but as security.

5. Payment in full to appellants for their outlays is reasonable.

First, because, as declared by a general and very just presumption of law, Coyne should be held to intend to make good the outlays which have been made for him at his request and for his benefit.

Second, because if Coyne should be required to pay in full for such outlays, he would be doing only what he was already bound by his Government contract and bond to do.

Third, had the contract proven profitable and a surplus left, Coyne, and not the appellants, would have received the profits. Aside from their reimbursement for necessary outlays, they would have received only 15 per cent. compensation for their services and that percentage, both presumably and under the proof, was a reasonable one.

Fourth, as the contract proved a losing one, if appellants, instead of being paid in full for their outlays for Coyne, were restricted to the inadequate yield of the two assigned funds, then, since they have satisfied the Government, the effect would be that Coyne and his surety would be wholly released from their obligation to complete their contract, but the appellants would have to shoulder the whole loss.

In other words, in consideration of a reasonable (15 per cent.) compensation for their services, appellants would have undertaken the entire labor and responsibility of completing the contract; have furnished all the money necessary to procure labor and materials; have become bound to complete the contract, however unprofitable; have had no share in profits, if any, however large; have been bound to bear all loss and bound in fact to procure the release of Coyne and his surety from an obligation to the Government, which the contract expressly states that Coyne was unable to meet.

This, it seems to us, would be utterly unreasonable, and yet it is a result which the Court of Appeals reaches only by implication. It is an implication which, we believe, this court will not indulge.

In support of its position, the lower court offers several reasons, which we will now briefly discuss.

It first says:

> "No stipulation is found looking to any other or further consideration, when it would have been most natural, if the intent had been that Coyne should bear all the risk of a final loss, to have provided in plain terms that he should repay all their disbursements, as well as their commissions."

As we have already shown, this assumes that there would be no obligation on Coyne's part to pay appellants for labor and materials supplied at his request, unless he had expressly agreed to pay them; which is to overlook the established presumption of law. Rather, as we said before, "it would have been most natural," if he wished to limit that liability, "to have provided in plain terms that he should" NOT "repay all their disbursements as well as commissions.

The court evidently overlooked the fact that Coyne did agree to repay all appellants' outlays, plus the commission, and he expressly agreed to give security for such payment; for, in clause 5 of the contract, he assigned the reserve held by the Government "for securing to the said Hardaway & Prowell all amounts that they shall have to pay on whatever account for the completion of said lock and dam," etc. Coyne was thus attempting to secure what he was obligated and intended to be obligated to pay; and what he was in fact obligated to pay was, first, the 15 per cent. commission, and, second, all amounts that appellants shall have to pay on whatever account for the completion of said lock and dam. The construction of the Court of Appeals places Coyne in the ridiculous attitude of securing a debt which he never intended to be liable for. We submit that the one fact alone, of Coyne's giving security for the commission and the outlays of appellants, proves that he intended to be liable for the obligations which he was thus securing.

Another reason given by the Court of Appeals for saying

that appellants undertook to finish the work "for that part of the original contract price which would be earned by so doing" is contained in the following words:

> "The fact that provision is made for the order in which the two funds, to be received through Government payments, are to be applied by appellants is inconsistent with the contention that the price to be paid them as contractors was to be the full cost of the work. If that was so, why was Coyne interested in the order in which the assigned funds should be paid out by them?" (Record, p. 129.)

It would have been absolutely idle for Coyne to provide the order in which the fund should be applied if the transfer of the funds was intended as full payment to appellants. It would have also been idle to designate exactly what percentage appellants should receive for their services if they were not to receive those percentages in full. The phraseology of the contract shows that it was drawn by a lawyer, and no lawyer would have stipulated that the fund was assigned as security, to be applied in a certain order, to the compensation and outlays of appellants and to debts which Coyne had contracted on his own account, when a mere assignment of the fund in satisfaction of the contract price would have expressed all that was necessary to be expressed.

Coyne was interested in the application of the checks because he owed other parties for labor and materials and naturally wanted to have those debts discharged so as to obtain his own release and the release of his surety. Then, too, the contract shows that he anticipated that certain expenses would have to be incurred in settling with the Government and securing its acceptance of the work and the order of application of the proceeds of the checks was evidently provided so that all of these purposes might be accomplished.

It will be remembered that the reserve was pledged as security for the payment of the full amount of appellants' outlays and commissions. That is the unmistakable declaration in clause 5. It was consequently a contradiction of the language of the contract to hold that the fund was as-

signed in full payment instead of as a pledge. The words "for securing," in the fifth clause, can not be eliminated in construing the contract, and yet it is impossible to conceive how a fund could have been assigned in full payment and at the same time assigned as security.

Another reason for providing the order for applying the fund was evidently this: The parties must have thought that appellants' services would not be deemed labor, and consequently would not be covered by the contractor's bond. Hence the necessity for securing the value of those services by an assignment of that fund.

A third reason given for the court's ruling is "that the contract provides that the work was to be completed upon the terms and stipulations recited;" that one of those terms was that appellants were to receive the funds earned and to be earned, only the surplus of one of those funds to be paid over to Coyne in case both funds prove more than sufficient to pay appellants' disbursements and commission. This provision is relied upon by the court to prove that the agreement was that appellants would "complete the work with Coyne's plant and his quarry for that part of the original contract price which would be earned by so doing." Here the court concedes that Coyne obligated himself, primarily, to pay appellants' outlays and commission, but the court overlooked the important fact that Coyne himself did not treat the transfer of the funds as an absolute satisfaction, but a mere pledge for securing those outlays and commissions. The court's argument assumes that any surplus of the check fund, after paying appellants' outlays and compensation, would by implication belong to appellants—not to Coyne. We have already seen that the reverse is true—that when appellants shall have received the amount of their outlays and compensation, their claim will be fully satisfied. Of course, the parties expected the pledged fund to turn out more than sufficient to satisfy appellants' demands; hence the provision for paying over that surplus to Coyne. True, there may be no express promise that Coyne should pay any deficit created by the insufficiency of the collateral to satisfy the debts for which it was pledged, but such express provision is not necessary. There was the primary obliga-

tion of Coyne, whether express or implied, to pay those outlays and commissions, and that obligation was not satisfied by the pledge of collaterals, unless the proceeds of the collaterals equaled the obligation or unless the contract itself affirmatively provided that the collaterals were to be accepted as full satisfaction. There was no such affirmative provision. We contend, therefore, that Coyne's promise to meet his obligation is only partially satisfied by the collaterals and he is liable for the deficit. The error in the court's reasoning is this: The court seemed to be under the impression that, where collaterals were pledged and proved insufficient, the contract must affirmatively declare that the pledgor should be liable for the deficiency in order that he may be held for it; whereas, the rule of law is exactly the reverse—the pledgor is always bound for the full amount of his debt, unless he can produce an affirmative agreement exonerating him from liability created by the insufficiency of the collateral.

The court treated the omission to provide for recourse upon Coyne for the deficiency as an affirmative agreement to surrender the right to recourse, but the law implies the right to recourse unless it is affirmatively surrendered.

Clause 6 of the contract gave to appellants the right to cancel the agreement in case Coyne failed to deliver the monthly estimate checks as stipulated in clause 3. Without clause 6, appellants would have had the right to abandon the contract if Coyne had first committed a breach thereof. Surely the inserting of clause 6, giving a right to cancel the agreement if clause 3 should be violated, is no evidence of an intention to add to clause 5 a provision that if the collaterals pledged by clause 5 prove insufficient to pay Coyne's debt, he should be released from the deficiency.

The truth is there was no necessity for appellants to give up their right to look ultimately to Coyne and his surety. They supplied the labor and materials and to that extent aided Coyne and the appellee and enabled them to lift their obligation to the Government. We are confident that this court will not discharge their obligations to appellants without unmistakable provisions of the contract warranting such discharge.

THE CONTRACT PRICE NOT FULLY PAID TO APPELLANTS.

The Court of Appeals decided that the agreement constituted appellants mere lenders of money; but the court argued that if they were not lenders of money, but were subcontractors, they were only such for a fixed price, which the court held has been paid to them. That price, the court decided, was:

First, the free use of Coyne's plant;

Second, the checks which were to come from the Government for the unfinished work; and,

Third, the reserve of $8,176.75 held by the Government on finished work (Record, p. 29).

We filed a petition for rehearing and showed that part of this alleged contract price, to-wit., the reserve, had not in fact been paid to appellants, but that, on the contrary, the circuit court allowed that sum to the appellee by way of partial reimbursement for $13,261.76, which appellee was decreed to owe thirteen other parties who had supplied labor and materials to Coyne (Record, p. 102). Besides appellants were not paid the full amount of the other checks, for Coyne retained $207.25 from the July check; $100.00 from the August check; $118.65 from the September check; $200.00 from the October check; $150.00 from the January check, and $50.00 from the March check; total, $825.90 (Record, p. 18). The fact, then, that the supposed contract price had not been fully paid to appellants being established, it seemed that the Court of Appeals was compelled either to reverse the case, with directions to award judgment to appellants for this reserve and interest and $825.90, or else to change the ground for denying this fund to appellants. It did change the ground and this new ground is wholly untenable (Record, pp. 137-8).

The Court of Appeals fell back upon the opinion of the circuit court, holding that, inasmuch as the surety was charged with $13,261.76 for debts incurred by Coyne before June 2, 1903, the surety should be awarded the reserve fund. In other words, that Coyne had no right as against the surety to assign this fund as he did by section

5 of the contract. Appellants' claim is for their commissions of 15 per cent. (which, as we have shown, is a claim for labor), and for debts incurred by them for labor and materials. Suppose Coyne had received this reserve fund before the contract was made. It certainly would have been lawful for him to transfer it to appellants in payment for labor and materials furnished and to be furnished. If he could actually pay over the money in this way, why was it not equally lawful for him to make that assignment of the fund for that purpose? This view is not opposed to the doctrine of Prairie State National Bank v. U. S., 164 U. S., 227, wherein it is decided that the contractor may not *divert* the contract price to the prejudice of the surety, for in that case the assignment was made to repay a loan and not for labor and materials to be furnished. All the surety can demand is that the original contract price shall be used for labor and materials and that is precisely what Coyne did with this reserve when he assigned it to appellants for that purpose. No one denies that the surety who pays labor and material claims would be subrogated to the contractor's right to the contract price; but paying some claims does not entitle the surety to that price to the prejudice of unsatisfied claimants, and the fund could not be assigned to the surety until all claims for labor and materials are discharged, for he is the guarantor of all such claims.

It follows, therefore, that appellants, and not the surety, were entitled to the $8,176.75 in court; also to the $825.90 above mentioned, and they are entitled to the interest on those sums; and, inasmuch as appellants supplied labor amounting to $7,556.00 in superintending the work, they are also entitled to that sum, with interest at the rate of 8 per cent., being the Alabama rate. But we earnestly insist that they were subcontractors and did supply labor and materials to Coyne and should recover the full amount allowed by the master.

WAS THE SURETY RELEASED BY A CHANGE IN THE CONTRACT?

Appellee contends that the Government contract was changed, without the surety's consent, by the substitution

of Coyne in the place of his firm and by the making of the contract with appellants, and that the surety was thereby released. The contention presupposes what never occurred. By no arrangement with the Government was Coyne substituted in place of his firm, nor does appellee contend that any provision of the principal contract was altered with or without the consent of the Government. Moreover, appellee does not claim that the United States consented to the alleged substitution of Coyne for his firm.

Even if the contract of February 5, 1901, be treated as an assignment to Coyne of the Government contract or as substituting him for his firm, the surety is still bound.

The circuit court sustained that contention upon the authority of the United States, etc. v. American Surety Co., 200 U. S., 197 (Record, p. 96), and the Court of Appeals concurred in that opinion (Record, p. 126).

The authorities amply support those courts.

In City T. S. D. & S. Co. v. U. S., for use, etc., 147 Fed., 155 C. C. A. 2d Circuit, new parties were taken into the firm of contractors after the bond was executed and the materials were furnished to the firm as thus newly constituted. The court held that the surety was not released.

In U. S., for use of Vermont Marble Co. v. Burgdoff, 13 App. D. C., 506, the contractor, Winfree, took in one Esher as a partner in the contract and the plaintiff supplied materials to the new firm of Winfree & Esher. The court held the surety liable for the materials.

An instructive case is Adams v. Haigler, 123 Ga., 659 or 51 S. E., 638. Haigler and Frey were the contractors. One of the contractors began the work alone and abandoned it. The other contractor then took up the work. The surety pleaded that by permitting this the c or changed the contract and discharged the surety. The court held:

> "It would seem from the allegations of the petition that, while the contract was a joint one of Haigler and Frey, the work was first carried on by Frey alone; and if he had completed the work this would have been a compliance with the contract, for the performance by either of the joint

> obligors would have been a sufficient compliance with the contract."

In Kaufman v. Cooper, 46 Neb., 645 or 65 N. W., 796, Symonds & Blake were the contractors with the State. Kaufman became their surety upon a bond which bound the contractor to

> "fully pay all claims due for laborers, mechanics or furnishers of materials."

Plaintiff, Cooper, made a contract to supply materials to Symonds & Blake. That firm dissolved and a new firm, consisting of Blake and another Kaufman, was formed. Cooper delivered some of the materials to the new firm, who failed to pay for them, and Cooper brought suit on the bond. The court held that the surety was not released.

In Abbott v. Morrisette, 46 Minn., 10, Milsted & Belyea were contractors. Morrisette and Matteson became sureties on the bond which was

> "for the use of all persons who may do work or furnish materials pursuant to the contract."

Milsted & Belyea dissolved co-partnership, Belyea assigning to Milsted all his interest in the contract. Abbott thereafter sold materials to Milsted alone. Upon his failing to pay for the materials, Abbott sued on the bond. The court decided that Abbott could hold the surety.

See, also, Leader Printing Co. v. Lowry, 59 Pac., 242 or 9 Okl., 89, Drumheller v. Am. Surety Co., 71 Pac., 25, or 30 Wash., 530.

It will be seen from these authorities that the dropping out of some of the partners has no more effect towards releasing the surety than does the taking in of new partners in the contractors' firm.

As opposed to this view, appellee cited below U. S., for the use of Anniston, etc. v. National Surety Co., 92 Fed., 549. That case is impliedly against appellee.

Appellee also cited U. S. v. Rundle, 100 Fed., 400. This authority is not in point.

Appellee cited U. S. F. & G. Co. v. U. S., for use, etc., 191 U. S., 416. If this decision is in point, it is against appellee.

U. S. F. & G. Co. v. Omaha, 116 Fed., 145, cited by appellee, is also not pertinent.

INTEREST.

The contract was made and was executed in Alabama. The master computed interest to March 1, 1906, at 8 per cent., the Alabama rate, and allowed appellants $32,757.34 (Record, p. 17). The Alabama Code, section 2627, provides:

> "Interest accrues on breach of contract. All contracts, expressed or implied, for the payment of money or other thing, or for the performance of any act or duty, bear interest from the day such money, or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation thereof in money, performed."

The Alabama Supreme Court held:

> "When no time is fixed for the payment of a debt or legal liability, the law presumes it to be payable presently."
>
> Waring v. Henry & Moot, 30 Ala., 721.
>
> "On a contract to pay for goods sold and delivered, interest attaches from the delivery of the goods, unless the contract fixes some other time of payment."
>
> Sheilds v. Henry, 31 Ala., 53.

The Federal Court follows the State law in allowing interest at the rate fixed by that law.

> Kraegher v. C. C. Co., 119 Fed., 641 (C. C. A.);
> Carlisle v. Mercantile Tr. Co., 109 Fed., 177.

SOME OF THE APPELLEE'S CONTENTIONS.

Appellee says that the recovery against the surety would be unconscionable because, when appellants undertook the completion of the work, they did not give the surety notice of that fact. The work was undertaken in June, 1903, and some time in 1904 Riley, the general agent of the

surety, visited Tuscaloosa, because he had received a complaint from the Government that the work was not satisfactorily progressing (Record, pp. 34-5, 48-49). He (Riley) then approved the taking up of the work by appellants and even offered them financial assistance. (Record, pp. 48-9). Riley was present and heard this testimony when given (Record, p. 48) and yet never gave his deposition to contradict it. There is positively no evidence that appellants concealed from the surety the fact that they were doing the work. The mere fact that they did not inform the surety that the contract of June 2, 1903, was made can not be considered as a concealment, nor could it be construed as a conspiracy between Coyne and appellants to keep from the surety such knowledge. Therefore, the charge of appellee that such concealment and such conspiracy existed is unfounded. Besides, neither the bond nor any contract required the contractors, or the persons with whom they were contracting to give such notice to the surety; and it is not shown by evidence or otherwise that it was even customary to give a notice of this sort. Yet the circuit judge seemed to think a notice necessary only in case of appellants (Record, p. 100). He cited no authorities for his finding and we submit that it can not be supported upon principle or authority. In adjudging that the thirteen other claimants, who had supplied Coyne with materials, were entitled to be paid by the surety, the court evidently did not regard it necessary that *they* should have given notice to the surety that they were furnishing labor and materials to Coyne (Record, p. 86).

But why is it unconscionable to compel the surety to comply with its bond? It agreed to become liable if Coyne did not pay for the labor and materials; appellants took up the work in good faith and the loss was occasioned by no fault on their part. This risk of loss is one which the surety took and for which it received compensation.

It is not material to this case, yet appellee asserts that the surety had the right to take over the work itself; and, without testimony to warrant it, states that appellants "connived with Coyne" to prevent such taking over of the work. No testimony to establish connivance was taken.

Appellee's counsel refer to the Circuit Court's opinion, where the Court says that the cost of work was increased and that the "claim was not in many respects satisfactorily proved." Counsel also assert that the claim is fraudulent; also say that the monthly estimates made by the engineers show that the labor and supplies furnished by the appellants was worth only about one-half of what appellants now claim. In fact, the counsel use considerable space in their brief to prove that the claim is padded or excessive.

The truth is, that the claim as allowed by the master is shown by undisputed facts to be correct and the contention to the contrary was abandoned by the counsel when they entered into a stipulation as to the parts of the Record to be printed for this court. That stipulation recites that the items of the claim may not be printed and further recites that the account to be omitted from the printing contains the items of all alleged materials, with the dates upon which they were supplied and the amounts and prices thereof, also the alleged names of the laborers, the number of days and hours they worked and the amounts they earned (Record, p. 139). In view of this stipulation, counsel should not now attempt to dispute the accounts. It can hardly be expected that this Court would inquire into the correctness or incorrectness of any of the items of an account which the parties have stipulated it is not necessary to have before the court.

The agreed order of reference provides that claims might be filed, with the affidavit of the claimants, but the right to take further proof, as in equity cases, was reserved to the parties. Appellants' claim was filed and supported by the affidavit of R. P. Prowell. Subsequently appellee took the deposition of Mr. Prowell, and he again proved the correctness of the account. There is nothing in this record contradicting his evidence. If the appellee had seriously disputed the account it could easily have called as witnesses the bookkeeper, who actually kept the accounts, the time-keeper of the laborers and the parties who furnished the materials. It is a significant fact that no witness attempted to say that the laborers were not employed, or that the materials were not furnished.

We submit further that counsel was not justified in

saying that the engineer's estimates show the value of the material and labor furnished by appellants when the estimates are not in evidence. Even if such estimates were in the record, they were estimates based upon prices fixed in the contract with the Government and do not show what the work actually cost Hardaway & Prowell.

The Circuit Court said that "there was in fact a substantial change in the situation contemplated by the parties when the penal bond was executed." The situation was only changed by the contract of February 5, 1901, and by Coyne's subletting the work to appellants by the contract of June 2, 1903. These changes in the situation were lawful, as we have shown, and can not release the surety.

The Circuit Court also said that there was reckless disregard of the surety's rights and that this general fact shines through the contract of June 2, 1903. It will be remembered that Coyne, to quote from appellee's brief, "had gone broke;" that he was in debt to his laborers and supply men; that the surety might ultimately become responsible for these debts, to say nothing about the responsibility which the surety might be forced to assume for loss on account of the completion of the work. Under these circumstances, appellants agreed to take up the work for a compensation of 15 per cent., amounting to about $7,500.00, for a year and a half's services. We suggest that these facts show that the surety's interest was not disregarded at all. In fact, the parties believed they were protecting the surety, for the contract provides that the Government funds should be applied to the satisfaction of the very claims which the surety guaranteed should be paid. The parties believed that the reserve and monthly checks would be more than sufficient to discharge all obligations and thus release the surety. Coyne expected to receive a surplus (Record, p. 92).

Counsel states that Hardaway does not know whether or not $8,000.00 advanced by him in the progress of the work was ever repaid to him. Such question was not asked Hardaway and he did not testify upon the subject.

They say that Prowell can not tell what money he spent. He gave the dates and the amounts spent and the master reported them. (Record, 139—Stipulation.)

Appellee's counsel seem to misapprehend the meaning of Tennis Bros. Co. v. Wetzel & T. Ry. Co. That case decides the following points, applicable to the case at bar:

First, that superintending work is performing labor.

Second, that employing labor and paying for it with money advanced by themselves was in law supplying labor. Counsel for appellee misstate the contract in that case when they say it required pay-rolls to be submitted to the railroad company for approval and payment every third day. What the contract did require was: "The party of the first part (Tennis Bros. Co.) agrees to employ and pay for all labor necessary in the construction of said electric railway and to render bi-weekly bills at cost for said labor to party of the second part."

Third, that case further holds that where the labor was supplied at cost, plus 10 per cent., it was as much the supplying of labor as it would have been if Tennis Bros. Co. had agreed to furnish the labor for a fixed price.

Counsel argue that, in order to hold the surety, it must appear that Coyne was a subcontractor under his two partners and that he had a claim upon them for whatever he supplied or caused to be supplied. The circuit court took no such view, for it awarded judgment in favor of thirteen others claimants who had supplied labor and materials to Coyne. We have already shown that the taking in of new partners by the contractors, or the dropping out of some of the original partners, does not release the surety.

Counsel argue that the surety is entitled to subrogation or, more correctly speaking, to the right to recoup from all of the contractors whatever it may have to pay to the laborers and materialmen. Undoubtedly that is the law; but they seem to think the surety can not hold Willard & Cornwell for amounts which they pay for labor and materials supplied to Coyne alone, and this we submit is a misapprehension; for manifestly Willard, Cornwell and Coyne could not make an agreement between themselves, without the knowledge or consent of the surety, whereby the surety's right to recourse on all of them would be affected. For example, under a judgment of the circuit court, the surety has paid about $13,000.00 to parties who

supplied labor and materials to Coyne alone. Can there be any doubt that the surety has recourse upon all of the contractors for the sum thus paid?

Counsel assert that an agreement was "foisted" upon the surety, whereby appellants were not liable for loss due to their own mismanagement of the work. The answer is, no such agreement was made, and, as a matter of law, appellants could not recover for any loss which they might sustain by reason of their own mismanagement. They could not hold Coyne, nor were they authorized to use the funds he transferred to them to reimburse themselves for such a loss. Besides, the appellee's argument is valueless for the reason that it is based on no facts in the record. No mismanagement is shown.

The counsel labor under a misapprehension as to the equitable right of the surety to apply the contract price to the satisfaction of its liability. The surety may prevent a diversion of the fund; but, so long as that fund is used for procuring labor and materials, the surety is not injured and can not complain. In other words, the surety is not a preferred creditor superior to other creditors, supplying labor and materials. We contend that the assignment of the reserve of $8,176.75, having been made to appellants for labor and materials, was valid, and the lower courts erred in awarding that fund to the surety instead of to appellants. The Court of Appeals thought we assigned no error concerning that fund. The first assignment of errors in the Court of Appeals sets forth that the circuit court erred in dismissing Hardaway & Prowell's claim (Record, p. 103). We did not deem it necessary to particularize and assign error for each item of the claim.

Counsel for appellee say the laborers employed by appellants and the parties who furnished materials to them have been paid by appellants and, therefore, the persons furnishing labor and materials being satisfied, there can be no recovery by appellants. The truth is all the materials have not been paid for, as appellee's counsel show near the end of their brief; $5,055.26 still remain unpaid for. How would the counsel deal with a situation where persons supplied materials partly from a stock already on hand, partly from purchases made on credit, and partly from

purchases made for cash? The inference from their argument is that such persons would be considered as supplying only the materials bought on credit—which, of course, is not tenable.

Counsel say that the bank account of appellants is the only proof of expenditures. The itemized pay-rolls show what was expended for labor and the itemized claim for materials, taken from the account books, give each item of materials. Besides, the correctness of this claim is testified to by R. P. Prowell and not contradicted by any one.

Counsel argue that appellants' account can not be correct, because they say that Mr. Prowell testified that the bank account would show the amount of his disbursements and receipts. But Mr. Prowell did not say that the bank account of $57,410.59 was all for labor and materials. Appellants were operating a commissary, and many of these disbursements were for commissary goods. Mr. Fitts interrogated Prowell as follows:

> "Q. Then does the journal include all the items going to make up the $57,410.59 shown on the bank statement?
>
> "A. It does.
>
> "Q. Will you file this journal in court?
>
> "A. That will be submitted to the commissioner.
>
> "Q. Then the amount of $57,410.59 includes every disbursement made by Hardaway & Prowell during the progress of this work on all accounts?
>
> "A. All accounts.
>
> "Q. How much of the last-named sum of money was paid out for merchandise as distinguished from material entering into the physical construction of the lock?
>
> "A. $6,939.18." (Record, p. 52.)

Thus Mr. Prowell showed that the bank account of $57,410.59 covered $6,939.18, which was not for labor and materials going into the work. Then, too, he filed, during the same examination, "Exhibit No. 1," showing that his claim was for $50,373.39 for labor and materials, and in that exhibit he states that this was the purchase cost (Record, pp. 105-6). He could never have intended to

say that the bank account, amounting to $57,410.59, represented the cost of labor and materials, when he was then filing a detailed statement from his books, fixing the total cost of such labor and materials at $50,373.39, and was expressly testifying that this sum for labor and materials was correct.

CONCLUSION.

We submit that the *Circuit Court* erred in holding that appellants were assignees of the Government contract; that the *Court of Appeals* erred in deciding that appellants were lenders of money to Coyne; also in holding alternatively that appellants agreed to finish the work for the unearned checks and have been paid in full. If we are right in this, the appellants are entitled to $32,757.34, allowed by the master, with interest from March 1, 1906—the day to which he computed interest—at the Alabama rate of 8 per cent.

If the circuit court or the Court of Appeals did not thus err, then we submit that appellants should recover:

First, $8,176.75, reserved by the Government and subsequently paid into court, with 8 per cent. interest from February 24, 1905, the day the claim was filed with the master.

Second, $825.90 retained by Coyne from the Government's monthly check, with 8 per cent. interest from February 24, 1905.

Third, $7,556.00, being the 15 per cent. compensation agreed to be paid to appellants for their services, with 8 per cent. interest from February 24, 1905, the day the claim was filed in the cause, the filing before the master being "the full equivalent of the rendition of a stated account."

68 Fed., 115.

Respectfully submitted,

TEMPLE BODLEY,
Counsel for Appellants.

JOHN BRYCE BASKIN,
J. MANLY FOSTER,
W. B. OLIVER,
Of Counsel.

Office Supreme Court, U. S.
FILED.
NOV 30 1908
JAMES H. McKENNEY,
CLERK

No. 44.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

[redacted]

B. H. HARDAWAY AND R. P. PROWELL,
DOING BUSINESS AS HARDAWAY & PROWELL, - Appellants,

vs.

NATIONAL SURETY COMPANY, - - - - - - - - Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS,
SIXTH CIRCUIT.

BRIEF OF APPELLEE IN ANSWER TO REVISED BRIEF FOR APPELLANTS.

WILLIAM W. WATTS,
HENRY FITTS,
Solicitors for Appellee.

WILLIAM J. GRIFFIN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 654.

B. H. HARDAWAY AND R. P. PROWELL, DOING BUSINESS AS HARDAWAY & PROWELL, - *Appellants,*

versus

NATIONAL SURETY COMPANY, - - - - - *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

BRIEF OF APPELLEE IN ANSWER TO "REVISED BRIEF FOR APPELLANTS."

The revised brief for appellants makes no change in the line of argument advanced by their original brief. It cites but one authority, *i. e.*, Mullin v. United States, 109 Fed. 819, not cited in the former brief, and that adds nothing, either in novelty or weight, to the previous citations.

The object sought by the revision, made after the appellee's brief had been read by appellants, we believe, with all due respect, is to avoid the effect of the appellee's argument.

The following specific references (by pages) to the slight changes made by the revision may not be out of place.

Almost one-third of the revised brief (fourteen full printed pages, 6-20) is devoted to the minutest dissection of the contract between appellants and Coyne. Not once is the suggestion made that the contract be read from

its four corners. Various segregated portions or expressions are emphasized in the effort to destroy its manifest meaning when read in its entirety.

In dealing with the preamble, as a picture of the conditions prevailing between the parties, little mention is made of its direct reference to and virtual incorporation of the previous contract made by Coyne with his former partners, whereby he released them (so far as all, save the Government, are concerned) from all further liability on the contract; and no reference is made to Prowell's admittedly complete information of that contract, which was a matter of public record in Tuscaloosa (R. 33; appellee's brief, 4). Nor does the revision at this point contain any reminder that Prowell, in almost daily contact with Coyne, knew that he was openly conducting the business under the terms of the release of his former partners and upon his own individual responsibility.

The purpose of the play upon the word "advanced" in the discussion of the first paragraph (p. 10) does not appear.

There can be no force in the contention that appellants "nowhere agreed to make any advancements" when the express undertaking is "to furnish the necessary finances." Nor can we follow the suggestion that "*advance*" to pay Coyne's May payroll is not within the agreement "to furnish the necessary finances." Nor does it appear that that particular item of the claim was rejected by the Circuit Court for any other reason than those which lead to the rejection of the claim in its entirety.

Under the heading "Profits" (pp. 10-13) paragraphs 2, 3 and 4 of the contract are set out and the contention is laboriously made that the meaning of the contract is that if the monthly checks more than paid appellants 15 per cent and the cost of finishing the job, the overplus belonged to Coyne. This discussion seems purely academic, but is entirely sound. After the 15 per cent and full cost of doing the work and getting it accepted was paid Coyne was to have any overplus, regardless of which of the two funds it came from.

We do not find, as stated on p. 19, that

> "The Court of Appeals inferred that any balance of the check fund under paragraph 4 (*i. e.*, profits) were not intended to go to Coyne."

There being no such profits shown that precise question was not before the lower court, any more than before this court. But the construction of the contract by the Court of Appeals is clearly that which we have last stated.

There has never been any contention that Hardaway and Prowell could in any event have honestly taken a larger profit than 15 per cent upon their outlays, a liberal, though not unreasonable, earning upon *money risked* and labor and skill supplied in fulfilling contracts of this character. If more than that was yielded by the check and reserve funds, it belonged to Coyne; and this contingency was the sole consideration (other than the preference of labor and material claims in disbursing the reserve) which moved to him under the contract.

If the use of the word "obligations" (as commented upon on page 14) was less apt than another to fit in with the restriction of appellants to the available funds, such fitter word does not now occur to us. Had the word been "charge," we should be reading from revised brief "charge against whom? Coyne." "Charge by whom? Appellants."

The statement (top p. 15) "that to hold appellants restricted to the proceeds of the checks would be to disregard the express language of the contract and make much of it meaningless" is challenged. What language does it disregard? What part does it make meaningless?

As to "the most just presumption known to the law" (top p. 15), we venture to suggest that the revised brief supplies no rejoinder to Judge Lurton's answer to this suggestion (R. p. 127).

As to the "second" point (p. 15) Coyne's immunity from that obligation (so far as appellants could secure it to him) was a consideration, which moved to him, in the contract under discussion, and the scheme of preferential payments shows that he regarded this as perhaps all he was to get out of the contract; and that he regarded it of greater moment to him than the contingency of profit in excess of appellants' 15 per cent.

As to the "third" point (p. 15) the suggestion is in line with the construction of the contract given by the two lower courts and with every position taken by appellee in discussion of the case.

As to the "fourth" point (p. 15) the result of an unprofitable contract there depicted is not different from the usual condition with which the unsuccessful, in such

undertaking, are confronted. The 15 per cent was not "compensation for their services," but for doing all their contract required them to do, which included their assumption of the risk of being unable to complete the job with the proceeds of the two Government funds (check and reserve). If there is a hardship it is of their own making, and such hardships never construe contracts, else it were true that "hardships make shipwreck of the law."

As to the light thrown upon the meaning of the contract by the provisions for preferential disbursement of funds (pp. 17 and 18), a comparison of pages 17 and 20 of Revised Brief and the full context of Judge Lurton's opinion from which the quotations are made (R. 129) is invited. Has the brief answered the opinion?

It is idle, we submit, to contend that Hardaway and Prowell had any reason to wish for a preferential order of payment if all the money from both Government funds was to be turned over to them and if the contract had provided that Coyne and his solvent surety were to make good every deficit. If the contract had said that Coyne was to pay the entire cost of the work, in any event it could make little difference to him, in what order the funds were applied, the result would be the same to him.

Instead of the contractual order of application being meaningless under our theory (Revised Brief, p. 17), it was the very essence of the arrangement. There are two funds:

> A reserved fund, already earned in a sense, which Coyne believed should be saved to him entire.
>
> A monthly estimate (check) fund, yet to be earned, which was thought to be large enough to pay the cost of all work to be done and also the 15 per cent commission.

The whole possibilities of the situation, the *casus belli*, are these two funds—

Coyne: "How long can I keep Hardaway and Prowell away from the reserve?"

Hardaway and Prowell: "How certain can we make ourselves of obtaining the reserve?"

Method of negotiation:

Hardaway and Prowell insist upon consuming the check fund as quickly as possible in order to reach the reserve. Coyne insists upon protecting the laborers and materialmen, to whom he feels himself responsible, apart from his arrangement with Hardaway and Prowell.

Result:

Hardaway and Prowell get, out of the check fund, first their compensation in advance of all things else; next their advances, whether of money or credit; and last the claims of laborers and materialmen. So that this *last item out of the check fund*, which is *first out of the reserve*, is arranged to make the smallest possible hole in the check fund and the largest possible draw upon the reserve, nothing being left for it in the check fund which Hardaway and Prowell can apply elsewhere. So Coyne is brought to insist that if the reserve has to be involved at all the labor and materialmen must be first paid for. Then agrees that if any of the advances of Hardaway and Prowell then remain unpaid they may next resort to the reserve ahead of him. This provision he could not resist, for no part of the reserve was in any event available to him until the contract with the Government was fully complied with.

On page 21, under heading "Were Appellants Sub-contractors or Successors":

> "There is no agreement that the appellants shall supply the necessary labor and materials"

is quoted from the C. C. A. Opinion. The comments which follow all come from the appellants' persistent refusal to differentiate between "supplying money" and "supplying labor and material." A distinction so elaborately justified by the precedents that the court did not feel called upon to point it out anew as each sentence of its opinion was framed.

Under head of "Were Appellants Mere Lenders of Money" (pp. 23-26) two very fanciful distinctions are attempted:

(a) Page 25. "To pay one's own debt is not to advance money. But to furnish the money to pay the debt of another is to advance it."

The first statement is certainly true. The second finds no support in the ordinary meaning of the word "advance", which has a well defined use in business. Money is advanced when it is furnished in advance of the incoming of an expected fund out of which it is to be repaid. The master advances wages of the servant in anticipation of the pay day; the merchant advances to the farmer upon the crop, which the latter has mortgaged, and is to deliver, to the former; the insurance companies advance expense money to their soliciting agents against the maturity of premium notes, etc. The word was well used in this connection as the parties had the two funds in mind, (one already created, and the other being created), out of which they were to be repaid.

(b) Referring to the 2nd and 3rd subdivision of the 4th paragraph of the contract between Coyne and Hardaway and Prowell, we find:

> "2. All moneys advanced by Hardaway and Prowell and used in the prosecution of said work.
>
> "3. All debts necessarily incurred by the said Hardaway and Prowell for the prosecution of said work other than debts for labor and material."

The revised brief follows up the attempted distinction just adverted to and tries: (a) To make subdivision 2, "money advanced" refer to the May payroll of Coyne, incurred before Hardaway and Prowell contracted with him, which they afterwards paid.

And (b) to make subdivision 3:

> "All debts necessarily incurred by Hardaway and Prowell cover every thing put into the job by Hardaway and Prowell whether acquired for cash or purchased on credit."

We fail to see how this distinction could avail appellants anything if sound, but as already pointed out it is without merit.

The only difference between the two subdivisions is manifestly that, (2), relates to actual money which appellants put into the contract, and (3) to such money, material, labor or other supplies as they have procured on their credit and not paid for. There, as pointed out, appears no good reason for separating them into two subdivisions, except that the appellants were preferring, very humanly, themselves to their own creditors.

So much of the Revised Brief as appears under the heading of "Liability of Willard Cornwell and Surety" is but a rearrangement of matter contained in pp. 26-38 of the original brief, and the questions presented have been fully dealt with in appellee's brief.

The case of Mullin v. United States, 109 Fed. 819, is cited for the first time in the Revised Brief. Like others in the same line it shows that the surety being informed of the substitution gave timely and full consent thereto.

In dealing with the statement (on the middle of page 35), appellee criticises cases cited by us:

> "Commenting on Adams v. Haigler, 123 Georgia, 659, counsel says that the remaining partner took up the uncompleted work at the instance of the surety; but they overlook the fact that in the case at bar appellee, upon learning that appellants had undertaken the completion of this work, approved and ratified the same and encouraged appellants 'to complete the job at the earliest possible moment' and even offered financial assistance to appellants (Rec., 48 and 49). 'Riley, the general agent of appellee, heard this testimony when given (Rec. 50) but never gave his deposition to contradict it.'"

We refer to our statement of facts (appellee's brief, p. 6):

> "Neither Hardaway and Prowell, Joseph Coyne nor Willard & Cromwell ever notified the Surety Company that there had been a change in the management of the work, but Hardaway and Prowell went ahead with it upon their own account, wholly without consultation with the Surety (R. 28). The Surety only learned of appellants' connection with the work late in 1904 (R. 99), immediately before the orginal bill was filed; and only became acquainted with the purport of aforementioned contracts after the filing of the bill (R. 77)."

In addition to this Mr. Riley dealt fully with this subject in an affidavit on file in this cause, which was by stipulation of appellants' counsel, treated as a deposition, and at their instance omitted in printing their record. We take it that the court will not allow appellee to suffer by reason of its absence from the record, but will, in

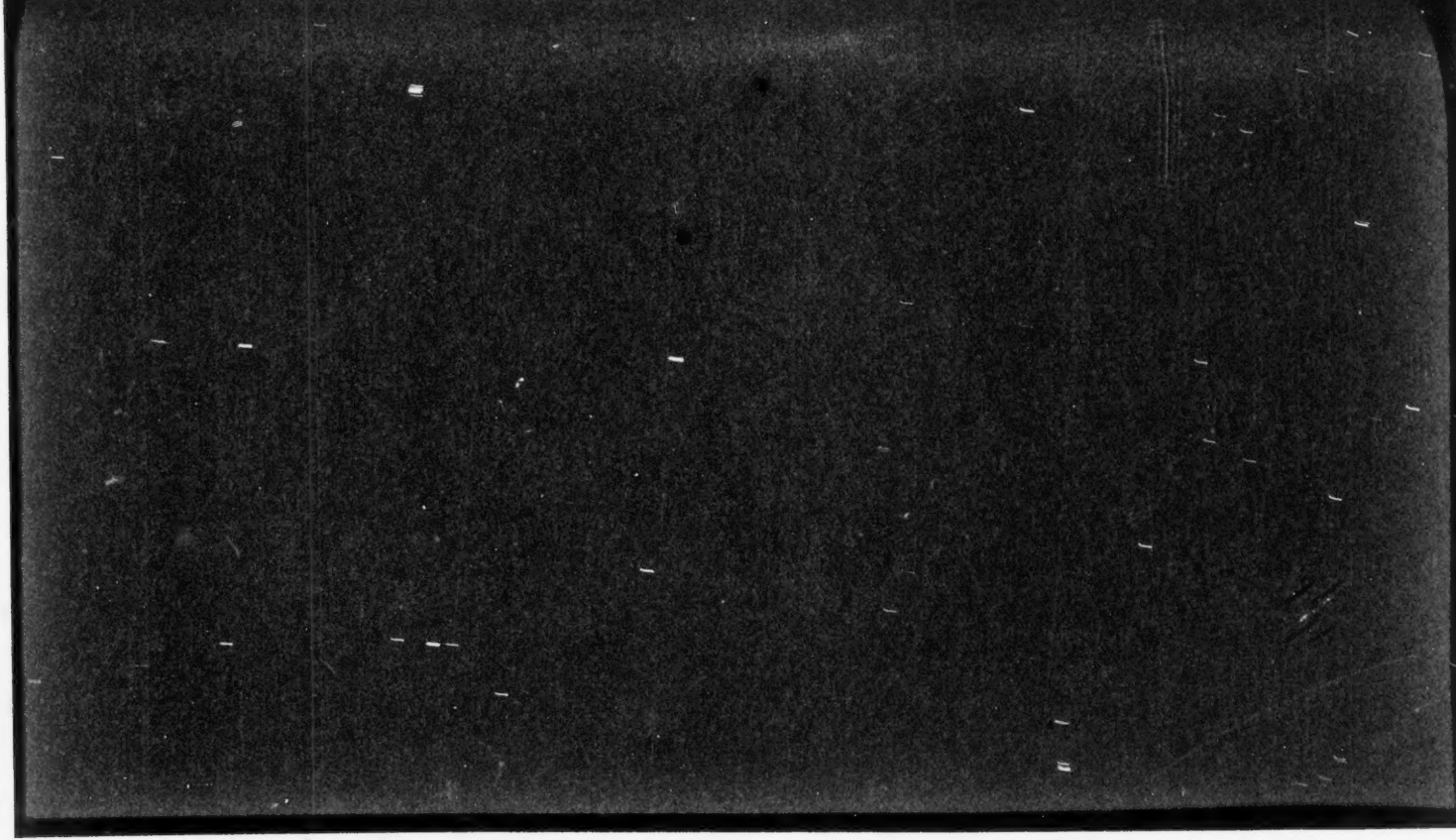
view of the references to this affidavit found in the printed testimony (p. 77) find that his testimony was in consonance with the finding of the lower courts, and the showing of the record on pp. 28, 55, 77, and 100.

We take it that an appellant presenting an abridged record can invoke no presumption of error because of omissions made at his instance.

Respectfully submitted,

WILLIAM W. WATTS,
HENRY FITTS,
Solicitors for Appellee.

WILLIAM J. GRIFFIN,
Of Counsel.



Supreme Court of the United States

OCTOBER TERM, 1906

B. H. HARDAWAY and R. P. PROWELL, Partners as Hardaway & Prowell, - - - - - Appellants,

vs.

NATIONAL SURETY COMPANY, - - - - - Appellees.

REVISED BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

Willard & Cornwell, a firm of contractors, composed of James E. Willard, Charles L. Cornwell and Joseph Coyne, on the 28th of September, 1899, entered into a contract with the United States, wherein they agreed to construct lock and dam No. 4 in the Black Warrior river, near Tuscaloosa, Alabama (Record, p. 19).

They executed bond, with appellee, National Surety Company, as surety for the faithful performance of the contract (Record, p. 9). The bond contained a clause (required by Act of Congress approved August, 1894), that the contractors would

> "promptly make full payments to all persons supplying them labor and materials in the prosecution of the work."

The contractors carried on the work until February 5, 1901, when they made an agreement, entirely between themselves, by which said Coyne was to pay the debts of his firm and to make all future purchases in his own name, and to receive all profits from the contract (Record, pp. 89 and 90). The United States was not asked to consent, and did not consent to this arrangement between the contractors (Record, pp. 13 and 99). The work was, after February 5, 1901, continued by Coyne. The Government, as before, made all payments by checks payable to "Willard &

Cornwell" (Record, pp. 13 and 38). The contract itself provided that they should be so made payable (Record, p. 91).

On June 2, 1903, Coyne, being financially unable to complete the contract, made a written agreement with appellants to finish it (Record, p. 90, etc.). Appellants completed the work and it was finally accepted and paid for by the United States (Record, pp. 13 and 14). The Government, therefore, has no interest in this litigation.

During the progress of the work, several freshets or washouts occurred, thereby making it necessary for appellants to do over a large part of what had before been done (Record, p. 49.) This is not contradicted. To complete the work cost appellants, over and above the amounts received from the United States, $32,757.34, including interest to March 1, 1906, and also including $7,556.00, being 15 per cent. on the cost expended, which sum was, under the contract, to be paid appellants for their compensation (Record, p. 17).

On October 24, 1904, appellee filed a bill in the United States Circuit Court, at Louisville, averring the insolvency of the contractors, and that there would be a loss for labor and materials, which it, as surety, would be compelled to pay, and making the usual averments for an injunction and the appointment of a receiver (Record, p. 1, etc.).

A temporary restraining order was granted, but, on November 8, 1904, an agreed order was entered, vacating the restraining order and referring the cause to a special master. The order provided that parties having claims for labor and materials might prove the same by affidavits, but the right to contest the claims and to take proof as in equity cases was reserved. The agreed order further provided that appellee shall pay into court, in satisfaction of the claims and cost of the action, such a sum as might be required after the payments from the Government shall have been exhausted (Record, p. 12, etc.).

The appellants duly filed their itemized claim with the special master. The items are omitted in the printed record by stipulation (Record, p. 139). The special master allowed the claim, except certain items therein (Record, p. 14). Appellee filed exceptions to the master's report allowing the claim (Record, p. 78, etc.). The excep-

tions were sustained and the entire claim was denied (Record, pp. 86-89). Appellants prosecuted an appeal (Record, p. 88) and the Circuit Court of Appeals affirmed the decree (Record, pp. 121, 122) though upon grounds different from those taken by the lower court. Appellants prayed an appeal to this court (Record, p. 130) and filed their assignment of errors (Record, p. 133).

The circuit court denied appellants' claim upon the ground that appellants were not subcontractors, but were successors of the contractors, and that, therefore, their claim is "for supplies furnished to themselves by themselves" and not a claim for materials and labor "supplied to Willard & Cornwell or to either member of that firm." (Record, p. 99.) This construction is based upon the contract of June 2, 1903, between appellants and Joseph Coyne (Record, p. 90). In fact, the whole case turns upon the construction of that contract.

The Court of Appeals affirmed the case upon entirely different grounds. That court held:

First, that appellants were not subcontractors in the sense of supplying labor and materials to Willard & Cornwell, or Coyne, *but were mere lenders of money to Coyne.*

Second, that a party lending money to be used in procuring labor and materials can not recover on the contractors' bond, even though the money be actually used only for that purpose.

Third, that even if appellants be deemed subcontractors, they were only subcontractors for a fixed price, to-wit, the amounts which the United States might owe for the work and the free use of Coyne's machinery; and that the appellants have been paid that fixed price.

Fourth, that the reserve of $8,176.75, held by the United States on June 2, 1903, and referred to in the contract as "about $8,300.00," was properly allowed to the appellee, who, as surety, was, by the decree, charged with $13,261.76 to cover claims of other parties who had supplied labor and materials to Coyne. The court puts that ruling upon the ground that appellants were not subcontractors, but lenders of money, and upon the further ground that the surety was charged with claims for labor and materials furnished prior to the contract of June 2, 1903, and that the assignment of the fund, by the contract, was subordinate to the

surety's equity to have that fund applied so as to relieve the surety *pro tanto*, from its liability established by said decree.

SPECIFICATION OF ERRORS RELIED UPON.

To the decree of the Circuit Court of Appeals, the appellants assigned errors in substance as follows (Record, p. 133):

That the court erred—

(a) In adjudging that, in performing the contract of June 2, 1903, between appellants and Joseph Coyne (Record, p. 90, etc.), for the completion of lock and dam No. 4, appellants did not supply said Coyne with "labor and materials in the prosecution of the work."

(b) In adjudging that, in supplying said labor and materials, appellants were not subcontractors, but were lenders of money.

(c) In adjudging that appellants undertook to complete said work for the amounts that might be paid by the United States and adjudging that said sums have been paid to appellants.

(d) In adjudging that the reserve of $8,176.75 held by the United States was not lawfully assigned to appellants —though the assignment was for the purpose of procuring the completion of the work—and in adjudging that the circuit court properly allowed said sum to appellee to be applied in reduction of $13,261.76, the amount of claims of other parties who had furnished to said Coyne labor and materials in the work.

(e) In affirming the decree of the circuit court denying appellants' claim of $32,757.34 for labor and materials supplied by them to Joseph Coyne in the completion of said work.

BRIEF OF ARGUMENT.

We propose to discuss:

First, the *meaning of the contract* between Coyne and appellants to ascertain

(1) What appellants agreed to do.

(2) What and how they were to be paid.

Second, the *character of appellants* under the contract,

(1) As subcontractors, which we claim they were;

(2) As successors by assignment, which the circuit court held they were.

(3) As lenders of money, which the Court of Appeals held they were.

Third, the *liability of the surety.*

Perhaps the questions to be decided can best be presented by a running analysis of the contracts.

The contract (R., 19) between the Government and the original contractors and the bond given by the appellee as surety (R., 9) were in the usual form of Government contracts. Only one provision in them need to be specially referred to, namely, the clause in the bond providing that the contractors "shall promptly make full payments to all persons supplying them labor or materials in the prosecution of the work." (R., 9-10.)

The contract of February 5, 1901 (R., 89), between the three partners, whereby Willard and Cornwell retired from active participation in the conduct of the work, and Coyne alone undertook to complete it, provided that he should "pay all debts now due by said firm," that he should, "as agent and attorney-in-fact of said firm, . . . receive all moneys now due or hereafter to become due to said firm and have and receive all the profits," and that "all future purchases for said lock and dam No. 4 are to be made in the name of Joseph Coyne alone." The rest of this contract relates to the sale of the plant, tools, etc., by partners to Coyne and his payments to them.

In passing it may be remarked that both of the lower courts held that persons furnishing labor and materials to Coyne after he thus assumed entire charge of the work could recover against the appellee as surety for the firm. They both hold, however, that appellants did not thus furnish labor and materials.

The main controversy, however, concerns the proper construction of still another contract, namely, that of June 2, 1903 (R., 90), whereby Coyne procured the appellants, Hardaway and Prowell, to undertake the completion of the work. This contract we propose to quote and comment on, paragraph by paragraph, but first will give a brief summary of it.

APPELLANTS CONTRACT WITH COYNE.

The *preamble* recites Coyne's financial embarrassment, that he has made overtures to appellants "to take up said work and complete it" and that they "have *agreed* to do so." Then follow six paragraphs.

Paragraph 1 sets forth *all* else that appellants *agree* to do and says they are to receive an "agreed compensation of 15 per cent. upon the total cost of completing said contract."

Paragraph 2 gives appellants the use of Coyne's plant and quarry.

Paragraphs 3 and 4 (the latter embracing four sections) provide for the endorsement to appellants of the Government checks for each estimate upon work to be done by them and prescribes an order of application of the proceeds in payment of appellants' claims.

Paragraph 5 provides an assignment to appellants by Coyne of his interest in the reserve fund held by the Government of over $8,000, theretofore earned by him "for the *securing* of said Hardaway & Prowell all amounts they shall have to pay on whatever account for the completion of said lock and dam," etc., and prescribes, in four sections, an order of application of the fund first to pay "all debts for labor and material;" next, "any balance that may be *due*" appellants for their compensation; then any debts incurred by them in the prosecution of the work, etc., and, lastly, any balance to be paid to Coyne.

The sixth and last paragraph provides that if Coyne fails to have the Government checks properly endorsed so that appellants can collect them, they may *annul* the contract; but in that event they shall have a claim against Coyne for compensation and reimbursement.

Having given this summary of the contract to aid the court, we shall now quote its various parts in full with comments.

The *preamble* reads as follows:

> "State of Alabama,
>
> "Tuscaloosa County.
>
> "This contract, made this 2d day of June, 1903, by and between B. H. Hardaway and R. P. Prow-

ell, hereinafter called Hardaway & Prowell, parties of the first part, and Joseph Coyne, as party of the second part, witnesseth:

"That whereas Willard & Cornwell, a firm composed of J. E. Willard, C. R. Cornwell and the said Joseph Coyne, did heretofore, on to-wit, the — day of ————, 1899, enter into a contract with the United States for the construction of lock No. 4 in the Black Warrior river, above Tuscaloosa, Alabama; and whereas, shortly after the beginning of work upon said lock the said Joseph Coyne, by an arrangement between him and his co-partners, undertook to complete and finish said lock according to the specifications of the contract of said firm with the United States, and in consideration of such undertaking acquired the beneficial interest of said firm in said contract and was to receive all amounts paid by the United States in consideration of such contract; and, whereas, said lock is still uncompleted, and the said Joseph Coyne can not, on account of his inability to procure the necessary financial aid, and on account of the disorganization of his labor forces and for various and sundry other reasons, complete and finish the said work in accordance with the said contract; and whereas, *said contract is a valued asset to the said Joseph Coyne,* if the said work can be prosecuted to its completion under the terms of said contract, there being held in reserve by the Government under the terms of said contract about $8,300.00, which has already been earned by the said Coyne; and whereas, by reason of his said inability to finish said work, the said contract is about to be forfeited and the said *Coyne* is in imminent danger of losing not only *what profits may be made* upon the completion of the work, but the entire reserve fund also retained by the Government; and whereas, the said Joseph Coyne, *for the purpose of preventing the forfeiture* of said contract, has made overtures to the said Hardaway & Prowell to *take up said work* and complete it, and the said Hardaway & Prowell *have agreed to do so* upon the terms and stipulations hereinafter set forth; now, therefore . . ."

This preamble is referred to in the opinions of the lower courts and is significant as showing the situation of the parties and aiding in the construction of the rest of the contract. What was the situation of the parties when this contract was made? Willard, Cornwell and Coyne and their surety were all bound under their contract with the Government to complete the work. That contract, let it be particularly noted, was never altered in any respect. The circuit court (R., 100) seemed to think that because the "*situation* contemplated by the parties" was changed by the turning over of the job by Willard and Cornwell to Coyne and by his subletting to the appellants, therefore, the surety is not bound to pay for labor and materials supplied by appellants. In reply it will perhaps be sufficient to say that such change in the "*situation contemplated* by the parties," concerning as it does merely the manner of performing the Government contract, is at once inevitable, since no one can foresee what exigencies may arise in the performance to require such a change of situation, and is immaterial so long as the contract binding the surety is itself not changed.

The work proved unexpectedly difficult and additional time was given by the Government to complete it. Then Willard and Cornwell, as between themselves and their partner, Coyne, abandoned performance of the contract to Coyne; but of course were not thereby discharged from their obligation to the Government, or to persons supplying labor and materials for the work; for the Government contract required that they (all of them) "shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and materials."

Coyne became financially unable to complete the work. Had it then been abandoned, he, his partners and the surety would each and all have been liable not only to unpaid supply men but for damages to the Government. To avoid these damages, they had either to themselves supply the labor and materials to complete the work, or get some one else to do so for them. They were all relieved of this dilemma by the appellants, who at the request of one of them, Coyne, agreed "to take up said work and complete it;" and this they have done.

The circuit court (R., 100) considered appellants dere-

lict, because they did not serve notice on the surety of the making of this contract and held that because of this they are not entitled to the benefit of the bond. We submit there was no occasion for such notice any more than from any subcontractor who agrees with the original contractor to do part of the work which the latter and his surety are already bound to do or have done.

The circuit judge (R., 100) says, "If Hardaway & Prowell did not know of the existence of the penal bond, of course they did not contract with any reliance on it." [We apprehend that their actual knowledge of the bond and reliance on it were not required to entitle them to the benefit of it. That had been secured to them by the Government's contract with the surety whether they knew of its existence or not.] "On the contrary," continues the court, "if they did know of the bond good faith and every applicable equitable consideration demanded that full notice of the proposed change in the situation [not, be it noted, any proposed change in the *contract* with the Government whereby the surety was bound] should be given the surety—a party most vitally and obviously interested, to the end that it might have an opportunity to protect itself."

If anybody had told Hardaway or Prowell that he must give the surety notice of his contract with Coyne, his answer would probably have been, "Why?" for he would have been unable to see why it was necessary to tell the surety that he was going to relieve it by completing the job that Coyne, his partners and the surety were all bound to have completed and that Coyne was unable to complete.

Prowell was a creditor for labor and materials furnished for the work to Coyne and was a stockholder, director and salesman of Allen & Jemison Co., a corporation which had a similar claim (R., 32). He was seeking payment of these claims by Coyne, whereupon Coyne "for the purpose of preventing the forfeiture" of his firm's contract with the Government and thereby "losing not only what profits may be made upon the completion but the entire reserve fund also, retained by the Government, made overtures to said Hardaway & Prowell *to take up said work and complete it* and the said Hardaway & Prowell have *agreed to do so* upon the terms and stipulation hereinafter set forth."

The first paragraph of the contract is as follows:

> "1. The said Hardaway & Prowell do hereby undertake and agree with the said Joseph Coyne to superintend the completion of the said lock and No. 4, and to furnish the necessary finances for the completion thereof and to put in charge of said work a competent superintendent and to properly organize the work for an energetic prosecution thereof to completion, *for which services they are to receive an agreed compensation of 15 per cent. upon the total cost of completing said contract*, which total cost shall be construed to include all amounts necessarily expended and expenses incurred by Hardaway & Prowell in the completion of said work and all amounts necessarily paid and expenses incurred by them to effect a settlement with and acceptance of said lock and dam by the United States."

The preamble and this first paragraph show all that the appellants agreed to do in completing the work, namely, furnishing (1) a competent superintendent and (2) the money "for the completion" and (3) organizing and (4) superintending the work and (5) to "take up and complete" it. The first paragraph also, we contend, states expressly all the compensation they are to receive for their services, to-wit, "an agreed compensation of 15 per cent. upon the total cost of completing." We repeat: This first paragraph states all that appellants expressly agreed to do. In subsequent parts of the contract provision is made for the payment *to* them of all moneys which may be "advanced" by them; but they *nowhere agree to make* any advancements. As we shall see, they did in fact advance money to pay Coyne's unpaid laborers, but they did not in the contract agree to do it; and their claims for such advancements were rejected in the circuit court and are not before this court.

PROFITS.

The circuit court assumed that appellants' object in undertaking the work was to gain the *profits* which might

be made; and it argues that if appellants were to receive the profits they should bear the losses. There might be justice in this claim, if the profits were in truth to go to the appellants to swell their compensation. But this, we think it will appear, is not true.

The contract nowhere says appellants are to be entitled to any profits. On the contrary, it expressly says what their compensation shall be, namely, "an *agreed* compensation of 15 per cent. upon the total cost"—no less and no more. *Expressio unius exclusio alterius.*

Were they also entitled to profits, these would plainly be additional compensation; but as the contract nowhere mentions any other compensation than the 15 per cent. to hold that they are entitled to profits also would be to read into the contract, by implication, what is plainly excluded by the only express provision on the subject. Had it been intended that appellants should receive profits, it is to be presumed the contract would have said so, instead of expressly limiting their compensation to the percentage.

That Coyne was entitled to any profits accruing would be true, even if the contract had been silent on the subject; for while the law would presume that he promised to reimburse appellants for their outlays made at his request and to pay them a reasonable compensation for their services, it would not presume a promise to pay them any part of his profits.

There are several expressions in the contract, indicating that Coyne and not appellants would have been entitled to any profits. Profits are mentioned only in the preamble and it says, "Coyne is in imminent danger of losing . . . what *profits* may be made upon the completion of the work" by reason of impending forfeiture of the Government contract and *"for the purpose of preventing the forfeiture* has made overtures to appellants to take up the work and complete it."

That the agreed compensation of 15 per cent. is a reasonable one is to be presumed and is affirmatively shown by uncontroverted testimony (R., 51). To imply additional compensation in the way of profits would therefore be to imply an unreasonable excess of compensation, which the law would be averse to doing.

The appellants were, with their own money, to furnish all the labor and materials required, and it was but a reasonable precaution on their part to provide that they should handle the government money which Coyne, "as agent and attorney-in-fact" for his firm was to receive on estimates of work to be done by the appellants; for they would thus secure the payment both of their outlays and percentage. This and no more, we contend, the contract intended to effect.

Its second, third and fourth paragraphs are as follows:

> "2. The said Joseph Coyne agrees to the above compensation for Hardaway & Prowell, and further agrees to turn over to them entire charge of the completion of said work, and not to interfere with them in any way in the prosecution of said work to completion, and further agrees to turn over to the said Hardaway & Prowell the entire outfit of machinery, tools, etc., which he now has at said lock and dam and the quarries where he is getting stone, and to give the use of the same to them for the completion of said work free of any charge.
>
> "3. The said Joseph Coyne further agrees to have all checks for each estimate upon said work forwarded by the Government to the said Hardaway & Prowell and to properly endorse such checks so that they may be collected by Hardaway & Prowell.
>
> "4. It is further agreed by all parties hereto that out of the proceeds of the checks referred to in the next foregoing paragraph the obligations shall be paid preferentially in the following order:
>
> "1. The compensation of the said Hardaway & Prowell as herein agreed for their services.
>
> "2. All moneys advanced by Hardaway & Prowell and used in the prosecution of said work.
>
> "3. All debts necessarily incurred by the said Hardaway & Prowell for the prosecution of said work other than debts for labor and material.
>
> "4. All debts incurred by said Hardaway & Prowell for labor and material or moneys advanced by them in payment of labor or material debts."

These last two paragraphs were not, we think, intended to increase or diminish appellants' compensation, but *only to provide a mode of payment*, protecting them in their compensation and outlays—a mode which would at once secure and facilitate their payment.

Observe the language of the paragraphs. They do not purport to define or measure the appellants' compensation. They do not say the proceeds of the checks shall belong to appellants. What they do say is that the checks are endorsed "so that they may be collected by Hardaway & Prowell" and "out of the proceeds of the checks" there shall be paid to appellants what? Profits? Not at all; but their outlays and "the compensation of said Hardaway & Prowell *as herein agreed*"—that is, the beforementioned "agreed compensation of 15 per cent;" and, we submit, no more.

But it may be contended that the agreed endorsement of the checks itself gave appellants title to all the proceeds, including any prospective profits. There might be force in this contention if the contract had simply provided that the checks should be endorsed to appellants, and had not explained the limited applications of their proceeds. But it went much further. In the first place, it says that they are to be endorsed "so that they may be *collected* by Hardaway & Prowell" and that "out of the proceeds . . . the obligations shall be paid preferentially as follows." It then enumerates the obligations to appellants, giving first place to their "agreed compensation of 15 per cent." Now, if the whole check proceeds had been intended to go to appellants in any event, this elaborate enumeration of applications was a waste of words. It would have given *appellants* no benefit, for without it they would have been free to protect themselves by making any application they chose. Nor would it have benefited Coyne; for if he would have no claim to the proceeds his only interest in their application would have been in having them used to pay those of the debts for which he would be bound to third parties, namely, appellants' debts mentioned in sections 3 and 4, which the prescribed order of application did not in the least increase their obligation to pay. But instead of this being done, the first two debts provided to be paid were appellants' compensation and advancements, which, *ex hypothesi*, Coyne was not bound for at all.

COYNE'S LIABILITY.

The Circuit Court of Appeals held that appellants are restricted by paragraph 4 to payment out of the Government checks, and therefore that Coyne and his partners are not liable to them for reimbursement or compensation. For the sake of clearness, we shall here consider only Coyne's liability under this contract and discuss the liability of his partners later on.

We claim that this paragraph merely provides a *mode of payment* of appellants' claims and was not intended to limit the previously imposed liability of Coyne for appellants' reimbursement and agreed compensation or to restrict payment to the amount of the fund applied, but simply to *apply* the proceeds toward meeting Coyne's "obligations" to them.

In substance, the Court of Appeals says it expressly provides that appellants' claims shall be paid out of the proceeds of the checks. True; but it does not say they shall be paid *only* out of those proceeds. On the contrary, this same paragraph expressly declares Coyne's obligation to pay these claims. It says: "Out of the proceeds of the checks . . . the *obligations* shall be paid preferentially in the following order," and then enumerates the four obligations. Obligations from whom? Manifestly Coyne. Obligations to whom? Manifestly appellants. No other persons are mentioned.

It will not do, therefore, to say, as the lower court does, that there is nothing in the contract to show that Coyne became personally bound to pay these "obligations" to appellants, for an "obligation" presupposes an obligor and obligee—in this case, Coyne (and his partners also, as we shall see later on) and appellants.

Again, the word "preferentially" in this paragraph is also significant, for it indicates that the parties regarded the check proceeds, upon their endorsement, as applicable generally to Coyne's debts, and that their "preferential" application to appellants' claims was made simply to protect them and not to increase or diminish their previously agreed compensation, or limit their reimbursement, or discharge Coyne of his "obligation" to pay them in full.

We submit that to hold appellants restricted to the pro-

ceeds of the checks would be to disregard the express language of the contract and make much of it meaningless.

To imply, as the Court of Appeals does, that because their claims are payable out of those proceeds they are payable only out of them, would be by mere implication to overcome one of the most just presumptions known to the law, namely, that where, in the absence of words to the contrary, one supplies materials and does work at the request of another a promise to pay their reasonable value is presumed.

Payment in full to appellants would only be reasonable and should be presumed,

First, because, as declared by a very just presumption of law, Coyne should be held to intend to make good the outlays which have been made for him at his request and for his benefit.

Second, because if Coyne should be required to pay in full for such outlays, he would be doing only what he was already bound by his Government contract and bond to do.

Third, had the contract proven profitable and a surplus left, Coyne, and not the appellants, would have received the profits. Aside from their reimbursement for necessary outlays, they would have received only 15 per cent. compensation for their services and that percentage, both presumably and under the proof, was a reasonable one.

Fourth, as the contract proved a losing one, if appellants, instead of being paid in full for their outlays for Coyne, were restricted to the inadequate yield of the two assigned funds, then, since they have satisfied the Government, the effect would be that Coyne and his surety would get the whole benefit of appellants' services and outlays and would be wholly released from their obligation to complete their contract, but the appellants would have to shoulder the whole loss.

In other words, in consideration of a reasonable (15 per cent.) compensation for their services, appellants would have undertaken the entire labor and responsibility of completing the contract; have furnished all the money necessary to procure labor and materials; have become bound to complete the contract, however unprofitable; have had no share in profits, if any, however large; have

been bound to bear all loss and bound, in fact, to procure the release of Coyne and his surety from an obligation to the Government, which the contract expressly states that Coyne was unable to meet,

This, it seems to us, would be utterly unreasonable, and yet it is a result which the Court of Appeals reaches only by implication. It is an implication which, we believe, this court will not indulge.

The fifth paragraph of the contract reads as follows:

> "5. The said Joseph Coyne, for the completion of said work and *for securing* to the said Hardaway & Prowell all amounts that they shall have to pay on whatever account for the completion of said lock and dam and for a settlement with the United States and acceptance of said lock and dam by the proper authorities of the Government, does hereby assign and set over to the said Hardaway & Prowell *all* his interest in the amount, aggregating, as aforesaid, about $8,300, retained and now held in reserve by the Government under the said contract for the building of said lock and dam, which shall be applied by the said Hardaway & Prowell in the following order:
>
> "1. To the payment of *all* debts for labor and material incurred in the building of said lock and dam.
>
> "2. Any balance that may be *due* to said Hardaway and Prowell for their compensation under this contract.
>
> "3. All other necessary debts incurred in the prosecution of the said work by Hardaway & Prowell, and all amounts, including expenses, which they shall have to pay in order to effect a settlement with the Government and acceptance by it of said lock and dam.
>
> "4. Any balance to be paid to said Joseph Coyne.

Here again the obligation of Coyne to pay appellants in full is made plain. The reserve fund is assigned to them expressly "for the completion of said work and for the securing to" them of their claims and one of these

claims is for "any balance that may be *due* said Hardaway & Prowell for their compensation," etc.

"Due" from whom? Manifestly from Coyne, or Coyne and his partners. Balance from what? Manifestly any balance left unpaid of the check proceeds mentioned in the preceding paragraph 4 and out of which the Court of Appeals held that the contract meant that appellants were to be exclusively paid, because it says that "out of the proceeds of the checks . . . the obligations shall be paid preferentially in the following order."

To hold, as that court did, that Coyne was not personally liable to them for these claims is to say that he was securing obligations he never intended to be liable for. If there were no other language in the contract showing his obligation, we submit that the fact of his giving security to appellants for their reimbursement and compensation proves that the parties intended he should be obligated. One does not give security for debts that he has never agreed to pay.

The Court of Appeals says:

> "The fact that provision is made for the order in which the two funds, to be received through Government payments, are to be applied by appellants is inconsistent with the contention that the price to be paid them as contractors was to be the full cost of the work. If that was so, why was Coyne interested in the order in which the assigned funds should be paid out by them?" (R., p. 129.)

The answer to this is threefold: *First*, the order of application might be rational even if Coyne were not interested in it, for the *appellants* might be interested in it, and in fact were; *secondly*, we have already seen how meaningless the order of application would have been under the theory of appellee; and *thirdly*, according to our interpretation of the contract, it was such as both parties would naturally have desired, as we shall now endeavor to show.

The *reserve* fund, which Coyne had already earned, and which is applied by paragraph 5, he naturally required to be first applied to pay "all debts for labor and

materials" because he and his firm owed such debts when he contracted with appellants and accordingly section 1 of that paragraph so provides.

Those debts having been provided for, the appellants naturally required that the rest of the reserve fund should be applied first to that one of their claims which might be least secure in a marshaling of assets amongst Coyne's creditors and accordingly section 2 next gives preference to their compensation.

On the other hand, the *check proceeds* mentioned in the preceding fourth paragraph, being such as would result from *appellants'* work, they required to be preferentially applied first to their least secure claims; and hence their highly preferential labor and material claims are postponed and their claim for compensation placed first.

That there was some reason for their thinking their compensation might be held inferior is persuasively shown by the fact that the lower courts have denied their contention that their services in organizing and superintending the work were "labor" within the meaning of the bond.

The Court of Appeals says:

> "It would have been most natural, if the intent had been that Coyne should bear all the risk of a final loss, to have provided in plain terms that he should repay all their disbursements, as well as their commissions." (R., 129.)

This assumes that the contract does not show an obligation on Coyne's part to pay them, which we have seen is not true. It also reverses the rule of law which, in the absence of words to the contrary, presumes Coyne's obligation to pay for labor and materials supplied at his request. Furthermore, it is inconsistent and proves its own fallacy; for if Coyne's obligation to reimburse appellants in full for their *outlays* does not exist because it is not plainly expressed, then his obligation to pay in full their agreed *"compensation,"* which certainly is expressed, by parity of reasoning could only be limited by plainly saying so; whereas, instead of saying so, the contract says the "agreed compensation of 15 per cent." is an "obligation,"

and is "due" to appellants and that any unpaid "balance" thereof is both "due" to them and is secured by assignment of the reserve fund.

Recurring again for a moment to the question of profits, because paragraph 5 does and paragraph 4 does not expressly provide for the payment of any balance to Coyne, the Court of Appeals inferred that any balance of the check fund under paragraph 4 (i. e., profits) were not intended to go to Coyne. This position, which seems to us to demand greater perspicuity and harmony of phrase than are ordinarily found in such contracts, was, we suppose, due to a misapprehension of the different objects of the two paragraphs. Paragraph 5 first assigns *all* Coyne's interest in the reserve fund of $8,300 and then provides that the *whole* of it "shall be applied in the following order:" If after paying the three enumerated claims there were a balance, the applications would not have covered the whole assigned fund unless there were added a provision disposing of the balance also; and hence as is usual in case of formal pledges, there was the provision added for the return of any balance to Coyne.

Not so in paragraph 4. Here, as we have contended, there was no intention to assign all Coyne's interest in the check proceeds, but only "out of" them to make payments on certain claims to the appellants and therefore there was no need to expressly direct the balance, if any, to be paid to Coyne.

The sixth and last paragraph of the contract is as follows:

> "6. It is understood and agreed by all parties hereto that if the said Joseph Coyne should at any time fail or be unable to turn over to the said Hardaway & Prowell the checks for estimates on said work, properly endorsed so that Hardaway & Prowell can collect them, or should fail to secure the collection of them by the said Hardaway & Prowell, then the said Hardaway & Prowell shall in that event have the option of *annulling* this contract and stopping work without notice to the said Joseph Coyne, or to any other parties whomsoever,

but in said event the said Hardaway & Prowell shall have a claim against the said Joseph Coyne for all moneys furnished by them and expenses incurred by them upon any account whatsoever in the prosecution of said work, and which shall not have been repaid to them, and for all compensation earned under this contract and not paid to them and such claim shall be due and payable at once upon their termination of the contract."

The provision in this paragraph, that in case of *annulment* appellants shall have a claim against Coyne, was evidently made because the lawyer drafting it considered that the annulment would have avoided the entire contract and extinguished appellants' rights under it and left them for reimbursement and compensation to a *quantum meruit.*

But, says appellee, why were their claims against Coyne for payment in full not likewise expressly provided in paragraph 4 if it was intended that Coyne should pay them in full?

The answer is twofold: *First,* it was so expressly provided, as we think we have shown; *secondly,* if it had not been there was no similar necessity for such an express provision in paragraph 4, because, if the contract was not annulled and the contract were silent on the subject, the law would presume Coyne's obligation to reimburse appellant and pay them a reasonable compensation for their services.

Having quoted and commented upon the whole contract between Coyne and the appellants to show what each agreed to do and having shown, we trust (1) that profits would have belonged to Coyne and (2) that the contract does not restrict appellants to payment out of the Government payments, we shall now consider the character of the appellants as *subcontractors* (which we claim they were) or *successors* to Coyne (which the circuit judge held them to be) or mere *lenders of money* (which the Court of Appeals considered them).

WERE APPELLANTS SUBCONTRACTORS, OR SUCCESSORS?

The Court of Appeals says: "There is no agreement that (appellants) shall supply the necessary labor and materials to finish the work."

This statement is surprising in view of what we have seen the contract says. It is true, indeed, that it does not say in those words that they "shall supply the necessary labor and materials to finish the work," but it does say that Coyne has made overtures to them *"to take up said work and complete it"* and it does say they *"have agreed to do so."* If this language does not mean that they are to supply the necessary labor and material expressly required by the Government contract referred to, we are at a loss to know what meaning it can have; for how they can take up and complete the work without such labor and material we can not conceive. Somebody furnished this labor and these materials. Coyne did not. He did not hire a man or buy an article. According to appellee's own theory, he did not become bound for either; but appellants hired the men and alone agreed to pay them; bought the materials and were alone indebted for them, and actually put them in the work. Nor is this all. That they were to furnish the labor and materials and with their own money and credit is shown, we think, by nearly every paragraph of the contract. Otherwise, why did Coyne endorse his firm's checks to them to pay them all moneys used in the prosecution of said work and the "debts incurred by *(them)* for the prosecution of the work" and "all debts incurred by *(them) for labor and materials?"*

If appellants had not agreed to furnish the necessary labor and materials, why did Coyne in the fifth paragraph pledge his reserve fund to pay. . . "all debts for labor and material," including appellants, as well as "all other necessary debts incurred in the prosecution of the work by said Hardaway & Prowell."

If they were not to furnish the labor and material and on their own credit, or out of their own money, why, in the event of annulment under paragraph 6, should they have as there provided "a claim against said Joseph Coyne

for . . . all expenses incurred by them . . . in the prosecution of said work?"

The parties themselves put no such interpretation upon their contract. Coyne had agreed "not to interfere in any way with the prosecution of said work" and he did not. Appellants, like any other subcontractors and with their own credit with merchants and laborers, certainly bought the materials and hired the labor that went into the work and, like any other subcontractors, paid their debts for these materials and labor with their own money, including of course what they had received from time to time from the principal contractors.

In its exceptions to the master's report, appellee contended that appellants "are the assignee and successors in beneficial interest to said Government contract, etc." (Record, p. 83); and this is the contention which the circuit court sustained (Record, pp. 101-2). The Court of Appeals ignored that view and decided that appellants were mere lenders of money to Coyne (Record, p. 128).

Bouvier defines successor as "one who follows or comes into the place of another." We take it that to constitute appellants the assignee or successor of Coyne, they must have taken his place in the Government contract. That contract was by its terms expressly made non-assignable (Record, 21); (U. S. Rev. Stat., sec. 3737).

As in physics two bodies can not occupy the same space at the same time, so in law an original contractor must be eliminated from a contract before another can be his successor. But the Government contract was never altered in any particular and Coyne and his partners remained parties bound by it.

Nor could it be assigned without the Government's consent and this was never given.

We think there was no intention or attempt to assign that contract. There was, indeed, a contract made between the contractors themselves, whereby one of them was to complete the work, make purchases in his own name, receive the profits and pay his partners' shares of the firm debts; but this did not make another and non-assignable contract assignable, nor make Coyne an assignee or successor of his partners under the previous unaltered con-

tract with the Government under which their status and obligations remained precisely as before.

A fortiori appellants were not assignees or successors to the Government contract by reason of their contract with Coyne. Their contract did not say so, and we think it will appear that the parties did not intend that it should have such effect.

If appellants were successors to the Government contract, they would be entitled to all its proceeds, including profits, but we have seen that they were limited to reimbursement and an agreed compensation of 15 per cent.

The contract recites that it is a valued asset to *Coyne* if the work can be completed, also that *Coyne* is in imminent danger of losing the profits *which may be made,* as well as the reserve actually earned; and that "for the purpose of preventing the forfeiture of said contract (he) has made overtures to said Hardaway & Prowell to take up said work and complete it, and the said Hardaway & Prowell have agreed to do so," etc., etc., thus showing that Coyne intended to retain the Government contract. He certainly would lose "the profits which may be made" if he was selling the contract; and would by the sale defeat the very purpose of making the contract.

WERE APPELLANTS MERE LENDERS OF MONEY?

The Court of Appeals said:

> "If, as contended, there is an implied agreement to reimburse every outlay by Hardaway & Prowell in completing this work, is it more than an implied agreement to repay the money advanced under this contract to 'furnish the necessary finances' to complete the job?" (Record, p. 127.)

The court then held that appellants were mere agents of Coyne, advancing money to him but supplying no labor and materials (Record, pp. 129 and 130), that they had merely agreed to "finance Coyne," that their attitude was that of "mere lenders of money," and that as such they can not recover on the contractors' bond for money "loaned to Coyne."

This decision, it seems to us, is based upon an entire misconception of the meaning of the words "furnish the necessary finances for the completion" in paragraph 1, and the words "moneys advanced" in sections 2 and 4 of paragraph 4.

All that appellants *agreed* to do about the work is set forth in the preamble and first paragraph, and is (1) "to take up said work and complete it;" (2) "to furnish the necessary finances for the completion thereof;" (3) "to put in charge of said work a competent superintendent;" (4) "to properly organize the work for an energetic prosecution to completion," and (5) "to superintend the completion." They did not *agree* to *advance* a dollar. They evidently contemplated that, in order to get rid of claimants who had furnished Coyne with labor and materials, advancements *might* be necessary, and, accordingly, it was provided that *should* they make any such advancements, the same should be repaid them. But they did not *agree* to "advance" anything.

We contend that what they did agree to do was precisely what every subcontractor ordinarily agrees to do when he undertakes the completion of such Government work. The first question which would be discussed between such a contractor and the chief contractor would be: "Who is to furnish the money for the job?" that is, here, for the job of completion. If the chief contractor is to furnish it, he does not mean to "lend" it to the subcontractor but to furnish it for the job; and, conversely, if the subcontractor is to furnish it he does not mean to lend it to the chief contractor but to furnish it for the job. And so here the contract provides that appellants are to "furnish the necessary finances—*to Coyne?* Not at all. Not a dollar was to be furnished to him, but only *"for the completion."* Completion by whom? Manifestly by appellants, for they had agreed to "take up the work and complete it" and Coyne had agreed not to interfere in any way. The agreement was not to "finance *Coyne,"* as the Court of Appeals says, but to finance the *work;* in plain words, to supply with their own money and credit the labor and materials needed to complete it. It is difficult to conceive a loan of money to Coyne when he never received the money; when it was never placed to his credit or liable for his debts, and

when it was not paid out by him, nor upon his debts, nor upon his orders, and was in no way subject to his control.

Again, the next thing that appellants did agree to do was also precisely what any subcontractor, who undertakes to complete the chief contractor's job, would do, namely, "to put in charge of said work a competent superintendent." And so of the two other undertakings, "to properly organize the work for an energetic prosecution to completion" and "to superintend the completion."

It is important to note that appellants' claim is entirely for labor and materials. They did also file a claim before the master for money "advanced," but it was rejected and is not before this court.

But the Court of Appeals' construction virtually leaves out of view those clauses of the contract which apply to the claims for labor and materials and rests the decision upon expressions relating to "advancements" which we have seen appellants never *agreed* to make, but which it was only contemplated they might make, for purposes *other* than for labor and materials supplied by them. It treats the contract as if appellants' whole undertaking to superintend and complete the work and supply the labor and materials necessary to do so were subordinate to and embraced by their alleged agreement to "advance or loan" money; when, in fact, they never agreed to advance or loan money at all.

A consideration of the language used will, we think, show that the parties understood their agreements as we have interpreted them. To pay one's own debts is not to advance money. But to furnish the money for the debts of another is to advance it. Consequently, when the contract refers to moneys "advanced" in payment of labor and material debts, that could only mean the debts of *Coyne*. When the debts of *appellants* are contemplated, they are specifically designated *as "debts incurred by said Hardaway & Prowell,"* etc. Thus it appears that the parties had in mind, as different or distinct things, "moneys *advanced*" and *"debts incurred"* by appellants. But the Court of Appeals treated *"debts incurred* by Hardaway & Prowell for labor and materials" as if they were the same as *"moneys advanced* in payment of labor and material debts" *previously* incurred

by Coyne. The parties certainly intended to make a distinction between *advancements* and *debts*. A practical proof of this is the fact that appellants did advance the money and pay Coyne's laborers for May, 1903, the month immediately preceding the execution of the contract. But the master disallowed that item upon the ground that it was a mere loan to Coyne. The labor for that month was furnished by contract between the laborers and Coyne, and, of course, appellants did not supply that labor; hence their advancement of the money for the pay-roll for May was of necessity a loan.

Again, section 4 of the contract transfers funds to be applied to certain purposes *"preferentially in the following order."* In that "order" *"moneys advanced"* are mentioned second and *debts incurred* by appellants for labor and material are mentioned fourth. Now, the parties would never have created a preferential order for satisfying claims unless those claims were different in their characters. If all the claims were to be deemed advancements, as the Court of Appeals apprehended, it was idle to name them separately in the contract and provide for the order in which they should be paid.

Some meaning will, if practicable, be given to every clause of the contract; and if all the clauses of section 4 are construed to refer to advancements, then all those clauses, except clause 2, will be meaningless.

We submit the Court of Appeals erred in holding that the "debts incurred by Hardaway & Prowell for labor and material" were advancements or loans to Coyne.

LIABILITY OF WILLARD, CORNWELL AND SURETY.

Appellee, granting for argument both that appellants did supply the labor and materials for the work and that Coyne is personally bound to them, contends that Willard and Cornwell are not so bound (1) because the labor and material were not supplied *"to them,"* as the bond and the law require, and (2) because any claim against them (Willard and Cornwell) was *waived* by appellants when they contracted with Coyne.

It will be well to bear in mind the assumption just

stated, for in replying we shall assume (what we trust we have heretofore shown) that appellants did in fact supply the labor and materials and were not mere "lenders of money" or "assignees and successors," and also that Coyne is bound to them.

Appellee's brief (page 32), says, "appellants" . . . "expressly contracted for the absolute immunity of the retiring members from all liability on account of the work," and (page 35) "they expressly contracted that they would not look to the principals for payment."

No such contract will be found in the record. Counsel, we do not doubt, intended to assert only their conclusion and not a fact; but the form of statement is misleading. We must add, it is typical of many others in the brief, which we can not quote and comment on without unduly swelling this brief.

I.

We contend that Willard and Cornwell are bound as well as Coyne, because appellants did supply the labor and material to all of "them."

Ordinarily, one supplying labor and materials to a subcontractor has no direct dealing with the original contractors, but notwithstanding can hold them bound under the provision of a Government contract like the one in this case. So appellants, although having no direct dealing with Willard and Cornwell, can, we contend, look to them for payment for labor and material supplied, *not* because any contract they may have made with Coyne would bind Willard and Cornwell, but because the Government contract and bond, which were intended for appellants' protection, obligated *all* the partners to pay them in the event they supplied labor and materials for the work. As construed by the courts, the Government contract binds all and each of the chief contractors to pay for labor and material which may be supplied to *any one* to whom they may either directly or indirectly in any manner transfer the performance of any part of the work.

The Circuit Court of Appeals, although deciding against appellants on the two grounds (1) that they were lenders of money and (2) were to be paid out of the Gov-

ernment checks, on the question now being discussed held our contention sound and said:

> "The benefits of the bond in its secondary aspect are not limited to those directly supplying the contractors with labor and materials. In Hill v. American Surety Company, 200 U. S., 197, 205, it was said by Justice Day, speaking for the court, 'In view of the declared purpose of the statute, in the light of which this bond must be read, and considering that the act declares in terms the purpose to protect those who have furnished labor or material in the prosecution of the work, we think it would be giving too narrow a construction to its terms to limit its benefits to those only who supply such labor or materials directly to the contractor. The obligation is 'to make full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract.' This language, read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied. If the contractor sees fit to let the work to a subcontractor, who employs labor and buys materials which are used to carry out and fulfill the engagement of the original contract to construct a public building, he is thereby supplied with the materials and labor for the fulfillment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials.'
>
> "In Hill v. American Security Company, the principal contractor was the New Jersey Foundry Company. That company subcontracted a part of the work to the Richard Manufacturing Company. This subcontractor employed the two Hills to do certain of the work they had undertaken to do, and agreed to pay them $246.80 in full. The subcontractor only paid part and the Hills were held to be persons who had supplied labor and materials to the original contractors within the meaning

of the bond, and were given a judgment, not for the value of the labor and materials, but for the balance of the price which the contractors had agreed to pay them and which they had agreed to accept, the sum of $141.80. Thus it is clear, that under this very satisfactory and authoritative opinion, the appellants, Hardaway & Prowell, will be entitled to proceed against the bond given by Willard and Cornwell for any balance due them upon the price which Coyne in good faith agreed to pay them for the completion of the lock and dam in question, provided they occupy the attitude of subcontractors who have furnished labor and materials to the contractors. Whether Coyne, after he had acquired the beneficial interest of his partners in the contract and assumed its burdens, is to be regarded as an original principal contractor or as a subcontractor is of no practical importance. In either event persons who supplied him with labor and materials for the carrying on of the contract were within the protection of the bond, according to Hill v. American Surety Company. This the court below held, and all such claimants were given decrees against the bond. From these decrees the National Surety Company has not appealed. Neither does it make any difference in determining the liability of the bond to Hardaway and Prowell, whether we regard Coyne as an original or as a subcontractor. In either event, persons supplying him with labor and materials with which to execute the contract with the Government would be within the intent of the bond."

Even if the contract of February 5, 1901, be treated as an assignment to Coyne of the Government contract or as substituting him for his firm, we contend the surety is still bound.

The circuit court sustained that contention upon the authority of the United States, etc., v. American Surety Co., 200 U. S., 197 (Record, p. 96), and the Court of Appeals concurred in that opinion (Record, p. 126).

The authorities amply support them.

In City T. S. D. & S. Co. v. U. S., for use, etc., 147 Fed., 155 C. C. A. 2d circuit, new parties were taken into the firm of contractors after the bond was executed and the materials were furnished to the firm as thus newly constituted. The court held that the surety was not released.

In U. S. for use of Vermont Marble Co. v. Burgdoff, 13 App. D. C., 506, the contractor, Winfree, took in one Esher as a partner in the contract and the plaintiff supplied materials to the new firm of Winfree & Esher. The court held the surety liable for the materials. See also U. S. v. City Trust S. D. & S. Co., 21 App. D. C., 369.

An instructive case is Adams v. Haigler, 123 Ga., 659, or 51 S. E., 638. Haigler and Frey were the contractors. One of the contractors began the work alone and abandoned it. The other contractor then took up the work. The surety pleaded that by permitting this the owner changed the contract and discharged the surety. The court held:

> "It would seem from the allegations of the petition that, while the contract was a joint one of Haigler and Frey, the work was first carried on by Frey alone; and if he had completed the work this would have been a compliance with the contract, for the performance by either of the joint obligors would have been a sufficient compliance with the contract."

In Kaufman v. Cooper, 46 Neb., 645, or 65 N. W., 796, Symonds & Blake were the contractors with the State. Kaufman became their surety upon a bond which bound the contractor to "fully pay all claims due for laborers, mechanics or furnishers of materials." Plaintiff, Cooper, made a contract to supply materials to Symonds & Blake. That firm dissolved and a new firm, consisting of Blake and another Kaufman, was formed. Cooper delivered some of the materials to the new firm, who failed to pay for them, and Cooper brought suit on the bond. The court held that the surety was not released.

In Abbott v. Morrisette, 46 Minn., 10, Milsted & Belyea were contractors. Morrisette and Matteson became

sureties on the bond which was "for the use of all persons who may do work or furnish materials pursuant to the contract. Milsted & Belyea dissolved co-partnership, Belyea assigning to Milsted all his interest in the contract. Abbott thereafter sold materials to Milsted alone. Upon his failing to pay for the materials, Abbott sued on the bond. The court decided that Abbott could hold the surety.

See, also, Leader Printing Co. v. Lowry, 59 Pac., 242, or 9 Okl., 89, Drumheller v. Am. Surety Co., 71 Pac., 25, or 30 Wash., 530.

It will be seen from these authorities that the dropping out of some of the partners has no more effect towards releasing the surety than does the taking in of new partners in the contractors' firm.

As opposed to this view, appellee cited below U. S., for the use of Anniston, etc., v. National Surety Co., 92 Fed., 549. That case is impliedly against appellee.

Appellee also cited U. S. v. Rundle, 100 Fed., 400. This authority is not in point.

Appellee cited U. S. F. & G. Co. v. U. S., for use, etc., 191 U. S., 416. If this decision is in point, it is against appellee.

U. S. F. & G. Co. v. Omaha, etc., 116 Fed., 145, cited by appellee, is also not pertinent.

II.

But appellee will claim that Coyne made a written contract with his partners, whereby he was to pay the firm debts, make all purchases in his own name, receive all profits and complete the work. This is true. But that contract between the three partners did not and could not, of itself, impair the obligation of any partner under the Government contract to pay those who should supply labor and materials. If, therefore, as we here assume, appellants did supply the labor and materials, Willard and Cornwell are bound to them *unless they waived* the benefit of the obligation imposed by the Government for their benefit.

Did appellants waive this obligation? We understand appellee to contend that appellants did waive it, because, knowing of Coyne's contract with his partners, they made

a written contract with Coyne whereby they not only agreed to look to Coyne, or the applied funds, but agreed not to look to Willard and Cornwell. This we deny.

Certainly there was no such agreement expressed; nor can any, we think, be implied.

In the first place, it does not seem reasonable to suppose that appellants could have intended such a waiver; for, since Coyne was insolvent, it would have made them for a mere 15 per cent. commission on their own outlays, give their time and energies to Willard and Cornwell's work, bind themselves to make whatever outlays its completion might require, however large, and take the whole risk of loss and that too when the undertaking had already proved a losing one.

Now, the record shows that appellants were not unfamiliar with such work and they may well be presumed to have known that as supply-men they could look to the original contractors and their surety (not, as appellee claims they do, for *excessive* expenditures), but, as the contract says, "amounts *necessarily* expended and expenses incurred" for labor and materials which those contractors were already bound to pay for, and which, in fairness, they *ought* to pay for, and a 15 per cent. compensation, the reasonableness of which is not denied. We submit that under such circumstances the court will require strong evidence of an intention on their part to waive the right against Willard and Cornwell, which was provided for their protection in the Government contract and bond.

The mere fact that they made a contract with Coyne alone to supply the labor and materials and took his agreement to pay them is not such evidence, any more than it would be had they supplied any other subcontractor and taken his agreement to pay. Nor would the mere mode of payment by such subcontractor, or Coyne, alter the obligation of Willard and Cornwell. So, too, Coyne may have contracted in any form whatsoever for the mere payment of appellants without impairing their right under the Government contract against Willard and Cornwell.

Of course, appellants could have waived Willard and Cornwell's obligation to them, but we are unable to find where they have done so, or indicated any intention to do so, in their contract with Coyne. We have quoted every

part of it and believe Your Honors have seen that it contains nothing which can affect that obligation created, as it was, by act of Congress and the Government contract and bond, and by the act of appellants in supplying the labor and material and (in the language of this court in the Hill case cited) "not . . . by the particular contract or engagement under which the labor and materials were supplied."

By this contract with his partners Coyne became the primary debtor to appellants, and his partners were in effect sureties for him by reason of their contract and bond to the Government. The fact that appellants supplied Coyne with labor and materials really caused the liability of his partners to attach. It seems to us, therefore, that the very ground upon which appellee claims that those partners were released was the ground upon which their liability for Coyne's debts attached.

Counsel, we think, misapply the rule of law pertaining to the release of sureties. This court has declared that if the parties materially vary the contract—whether it be to the advantage or disadvantage of the surety—the surety is discharged; and this for the reason that the contract, as thus changed, is a different contract from the one which the surety was bound by.

> Prairie State Nat'l. Bank v. U. S., etc., 164 U. S., 227.

This, of course, is a general rule. It may be assumed for the sake of this argument that, ordinarily, if a surety becomes bound for the acts of a firm composed of several members, he (the surety) can not be held for the acts of that firm if one member thereof retires or if a new member is added. The citations of appellee are evidently intended to sustain that assumption. But the case at bar is very different, and depends upon a statute which renders the above rule inapplicable. Here, as we have seen, the surety obligated itself to be responsible for all labor and materials supplied for the lock and dam (R., 20 and 21). This court has held that where contractors engage a subcontractor and labor and materials are supplied to him, this is the same in effect as supplying labor and materials to the chief contractors. That is to say the labor thus

supplied to the subcontractor, being by or through the remote procurement of the chief contractors, must be deemed to have been supplied to such chief contractors.

U. S., for the use of, Hill vs. Am. Surety Co., 200 U. S., 197.

In Mullin vs. U. S., 109 Fed., 819, the Court of Appeals for the Second Circuit decided that where labor and materials are furnished by third parties, though not subcontractors with the consent of the chief contractors it was the same in effect as supplying the chief contractors. In that case Regan was the contractor and Krueger, Burne and Mullin were the indemnitors of the surety. The case arose under a bond similar to the one involved in this case. Chapin-Hall Lumber Company had made a contract to furnish all labor and materials to Regan, the contractor. We submit that this case is authority for the contention that where Coyne took up the work by arrangement with his partners, the person supplying labor and materials to Coyne has a right to look to the agreement of the chief contractors and to their surety. The court said:

> "Regan gave up, and, with the consent of all concerned, Krueger, Burne and Mullin took up the completion of the works under the contract with the Government for him; and the Chapin-Hall Lumber Company kept on and furnished the materials and labor to them under the contract with Regan. Question is made whether this furnishing of materials and labor is covered by the bond. The statute required the obligation of the bond to be, and that of this bond is, that Regan should promptly make payment to all persons supplying him labor or materials for the prosecution of the work. The Chapin-Hall Lumber Company comes within the description. It supplied materials and labor for the prosecution of the work, under contract with him, to those who by agreement of all rightly stood in his place. This was supplying him, within the terms of the bond, and what was so supplied and not promptly paid for would be recoverable on the bond."

It is immaterial whether the labor and materials are supplied to the contractor's firm, or to a member of the firm, or to a firm with members eliminated, or to a firm with new members added, or to a subcontractor. It is a significant fact that, though we cited in support of this view a decision of this court, two decisions of Courts of Appeals and several decisions from the State courts, the appellee has not produced any authority to the contrary, where a bond arising under the statute in question, or a similar statute, was involved, but contents itself by declaring that these citations are opposed to the weight of authority.

Appellee criticises cases cited by us. Commenting on Adams v. Haigler, 123 Georgia, 659, counsel say that the remaining partner took up the uncompleted work at the instance of the surety; but they overlooked the fact that in the case at bar appellee, upon learning that appellants had undertaken the completion of this work, approved and ratified the same and encouraged appellants "to complete the job at the earliest possible moment" and even offered financial assistance to appellants (Rec., 48 and 49). Riley, the general agent of appellee, heard this testimony when given (Rec., 50) but never gave his deposition to contradict it.

Counsl also seem to have overlooked the fact that in Adams v. Haigler, the court decided that where one of the partners of a firm of contractors failed to perform his part of the contract, the other partner has the right to complete it.

Willard and Cornwell abandoned the work to Coyne in February, 1901 (Rec., 4), and Coyne, therefore, had the right to complete it with or without their consent. Indeed, this is shown by the citation of appellee's counsel on page 29 of their brief, to-wit:

> "The dissolution of a partnership does not release it from contracts previously entered into, but unfulfilled. Each partner has the power, therefore, to complete such contracts, *and to bind the other partners by his acts in so doing.*" (Our italics.)

It is, therefore, immaterial whether appellants' contract to supply materials was made with the firm of contractors as originally constituted, or with Coyne alone, so long as he had a right to complete the work.

The case of Kaufman v. Cooper, supra, which counsel also criticise, is authority for the contention that furnishing labor and materials to Coyne binds his partners even *without* their contract with the Government to be responsible for labor and materials supplied for the work. The court said:

> "It is also urged that by the dissolution of the firm of Symonds & Blake, and the transfer of the contract to furnish the material and perform the labor to S. C. Blake & Co., or, by the new firm assuming its performance, the sureties on the bond were not bound to pay the account for material furnished by plaintiff to the latter firm for use in the performance of the contract with the State, under the contract it had made to do so, with Symonds & Blake. It is disclosed by the evidence that soon after the firm of Symonds & Blake had entered into the contract with the State, and had further contracted with the plaintiff for the furnishing by it of the material, Symonds withdrew from the firm, and S. C. Blake, or S. C. Blake & Co., which consisted of S. C. Blake and one Godfrey J. Kaufman, who became a partner with Blake at the time Symonds retired from the firm of Symonds & Blake and it was dissolved, succeeded to all the rights of the old firm in the contract with the State, and the plaintiff furnished to S. C. Blake & Co. the material for use in the fulfillment of the contract with the State, which it had contracted to furnish to Symonds & Blake. Under these circumstances, the sureties on the bond were not released, and an action on the bond could be maintained against them by plaintiff for the unpaid amount due it on account of material furnished to Blake, or S. C. Blake & Co., for use in the performance of the contract with the State."

In Abbott v. Morrisette, supra, the court did not, as appellee seems to contend, put its ruling upon the fact that the contractors dissolved partnership without the knowledge of plaintiff, who sold materials to the newly formed firm of contractors, but upon the admitted fact that the labor and materials were supplied for the work. The court said:

> "To show that it is not essential to the liability of these sureties that the principal obligors, Milsted & Belyea, should have both purchased the material for which a recovery is sought, we need only to call attention to the fact that those contractors might have sublet the whole contract, or any particular part of it, and yet unquestionably these sureties would have been responsible for material supplied to the subcontractor, and used by him in performing the original contract, although Milsted & Belyea would not have been personally bound to the sellers, *unless by force of the bond.* If the limited effect for which the appellants contend were given to the bond—if the withdrawal of one of several contractors, or an assignment by one of them, or all of them, is effectual to discharge the sureties as to material or labor afterwards supplied in the performance of the original contract—the result would be either that such bonds afford very uncertain security to the land owner against the liens of material-men and laborers, or else that the latter class do not enjoy the protection which the statute professes to give them."

We call attention to the words (underscored by us) "*unless* by force of the bond."

In Drumheller v. Amer. Surety Co., 71 Pacific, 25, after a contract to build a house and sidewalk was made the owners of the property made an arrangement with the contractors to themselves perform part of the work. The surety pleaded that on this account it was released. Held:

> "Had the contractors employed a stranger to build the sidewalk for $375, we think it would hard-

> ly be contended that such employment was not within the scope of the original contract. We also think that the arrangement with the respondents for the building of the sidewalk had no more effect upon the liability of the appellant than the employment of any other persons would have had. As to the work performed by them, the respondents were, to all intents and purposes, merely subcontractors."

This case would show that the surety is not discharged, no matter by whom the work was performed, so long as it is done by the procurement of the contractors, or with their express or presumed consent.

Leader Printing Co. v. Lowry, 59 Pacific, 245, shows that assigning a contract does not release the surety. The court said:

> "These bondsmen bound themselves to the territory for the faithful performance of this contract, and if Hoffman & Blincoe were to fail to carry out the terms of the same, either in person or by agents or assignees, then they would be liable." . . . . "The territory had a right to hold the original bond, and so long as it is retained by the territory those who executed it are liable for the fulfillment of the contract, regardless of how many times it may be assigned."

Having now discussed the chief questions in this case, we shall briefly consider several minor ones.

THE CONTRACT PRICE NOT FULLY PAID TO APPELLANTS.

The Court of Appeals decided that the agreement constituted appellants mere lenders of money, but argued that if they were not lenders of money, but subcontractors, they were only such for a fixed price, which the court held has been paid to them. That price, the court decided, was:

First, the free use of Coyne's plant;

Second, the checks which were to come from the Government for the unfinished work; and,

Third, the reserve of $8,176.75 held by the Government (Record, p. 29).

We filed a petition for rehearing and showed that part of this alleged contract price, to-wit, the reserve, had not in fact been paid to appellants, but that, on the contrary, the circuit court had allowed that sum to the appellee by way of partial reimbursement for $13,261.76, which appellee was decreed to owe thirteen other parties who had supplied labor and materials to Coyne (Record, p. 102). Besides, appellants were not paid the full amount of the other checks, for Coyne retained $207.25 from the July check; $100.00 from the August check; $118.65 from the September check; $200.00 from the October check; $150.00 from the January check, and $50.00 from the March check; total, $825.90 (Record, p. 18). The fact, then, that the supposed contract price had not been fully paid to appellants being established, it seemed that the Court of Appeals was compelled either to reverse the case, with directions to award judgment to appellants for this reserve and interest and $825.90, or else to change the ground for denying this fund to appellants. It did change the ground, and this new ground, we think, is wholly untenable (Record, p. 137-8).

The Court of Appeals fell back upon the opinion of the circuit court, holding that, inasmuch as the surety was charged with $13,261.76 for debts incurred by Coyne before June 2, 1903, the surety should be awarded the reserve fund; in other words, that Coyne had no right as against the surety to assign this fund as he did by section 5 of the contract. Appellants' claim is for their commissions of 15 per cent. (which really is a claim for labor), and for debts incurred by them for labor and materials. Clause 5 assigned this fund to appellants *"for the completion of said work,"* and in order to make plain what purposes were intended by these words the same clause went on to direct the order of application in order to carry out those purposes—debts for labor and materials being named first and appellants' compensation second. Suppose Coyne had received this reserve fund before the contract was made. It certainly would have been lawful for him to transfer it to appellants in payment for labor and materials furnished or to be furnished. If he could actually

pay over the money in this way, why was it not equally lawful for him to make that assignment of the fund for that purpose? This view is not opposed to the doctrine of Prairie State National Bank v. U. S., 164 U. S., 227, wherein it is decided that the contractor may not *divert* the contract price to the prejudice of the surety, for in that case the assignment was made to repay a loan and not for labor and materials to be furnished. All the surety can demand is that the original contract price shall be used for labor and materials, and that is precisely what Coyne did with this reserve when he assigned it to appellants for that purpose. We do not deny that the surety who pays labor and material claims would be subrogated to the contractor's right to the contract price; but paying some claims does not entitle the surety to that price to the prejudice of unsatisfied claimants, and the fund could not be assigned to the surety until all claims for labor and materials are discharged, for he is the guarantor of all such claims. The Court of Appeals was in error in saying that attention was not called to this point by brief. We discussed it on pages 24, 25 and 26 of our brief.

It follows, therefore, that appellants, and not the surety, were entitled to the $8,176.75 in court; also to the $825.90 above mentioned, and to interest on those sums; and, inasmuch as appellants supplied labor amounting to $7,556.00 in organizing and superintending the work, they are also entitled to that sum, with interest at the rate of 8 per cent., being the Alabama rate. But we earnestly insist that they were subcontractors and did supply labor and materials to Coyne and should recover the full amount allowed by the master.

SUPERINTENDING THE WORK IS PERFORMING LABOR.

The contract expressly bound appellants to "take up and complete" the work; and, in order to do this, to organize the force, put a competent superintendent in charge and furnish the necessary money "for the completion" and to "superintend the completion;" but as we have seen it did *not* bind them to make any loans or advancements to Coyne, or for his credit. Those services in brief embraced substan-

tially first, their furnishing the necessary materials and labor (including a "competent superintendent"), credit (just as any subcontractor does) and, secondly, giving their time to superintending the work of completion. The contract then says, "for which services they are to receive an agreed compensation of 15 per cent," etc. What is here meant by "services?" The word, derived from *servus*, a slave, is a common one and ordinarily means personal services. We think it means that here. Taking up and completing physical work, like the construction of a government dam involves, amongst other things, giving time, attention and often manual exertion, all of which are "services" in the ordinary sense of the word. Organizing the work and securing a competent superintendent are such "services." So, also, would be superintending the completion of the work.

It is, we apprehend, for such "services" that the percentage "compensation" is agreed to be paid. Lending Coyne money, or making advancements to or for him, was no part of such "services;" for, as we have seen, appellants never agreed to lend or advance money, but only to "furnish the necessary finances *for the completion" of the work.*

But even if they had agreed to lend money or make advancements, these would not, we think, be intended by the word "services." It will be well here to note a distinction commonly made between the words "service" and "services." "Service" by use has come to mean, in a secondary sense, any benefit to the *recipient.* For example, we say that friendly advice, or a valuable idea communicated to us has been "of service" to us and that the person communicating it has rendered us a "service." So, when we are in need, and one lends us money, we say he has rendered us a "service." But when we repay it we should never say we are paying him for his *"services."*

On the other hand, the plural form "services," as ordinarily used, refers not to the beneficiary, but to him who renders the services and implies personal services.

However, such refinements seem unimportant in view of the fact that appellants never agreed to lend or advance money to or for Coyne.

In Tennis Bros. & Co. v. W. & T. R. Co., 145 Fed., 458, the subcontractor agreed to employ the laborers, to advance the money and pay them and to "supervise" the work for

a fixed compensation of 10 per cent. The court held that such services was performing labor and entered a judgment establishing a mechanic's lien for the 10 per cent. under the West Virginia statute.

Prowell in superintending the work performed some manual labor (Record, p. 48). There is no contradiction of this evidence. But even if he had performed no manual labor, his superintending the work was supplying labor.

Flagstaff v. Cullins, 104 U. S., 704;
Cen. Trust Co. v. R. N. I. & B. R. R. Co., 54 Fed., 728 (C. C. A., 6th Cir.);
Tennis Bros. & Co. v. Wetzel, etc., 140 Fed., 193, affirmed in 145 Fed., 458.

INTEREST.

The contract was made and was executed in Alabama. The master computed interest to March 1, 1906, at 8 per cent., the Alabama rate, and allowed appellants $32,757.34 (Record, p. 17). The Alabama Code, section 2627, provides:

> "Interest accrues on breach of contract. All contracts, expressed or implied, for the payment of money or other thing, or for the performance of any act or duty, bear interest from the day such money, or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation thereof in money, performed."

The Alabama Supreme Court held:

> "When no time is fixed for the payment of a debt or legal liability, the law presumes it to be payable presently."
>
> Waring v. Henry & Moot, 30 Ala., 721.
>
> "On a contract to pay for goods sold and delivered, interest attaches from the delivery of the goods, unless the contract fixes some other time of payment."
>
> Sheilds v. Henry, 31 Ala., 53.

The Federal Court follows the State law in allowing interest at the rate fixed by that law.

> Kraegher v. C. C. Co., 119 Fed., 641 (C. C. A.);
> Carlisle v. Mercantile Tr. Co., 109 Fed., 177.

SOME OF THE APPELLEE'S CONTENTIONS.

Appellee says that the recovery against the surety would be unconscionable because, when appellants undertook the completion of the work, they did not give the surety notice of that fact. There is positively no evidence that appellants concealed from the surety the fact that they were doing the work. The mere fact that they did not inform the surety that the contract of June 2, 1903, was made can not be considered as a concealment, nor could it be construed as a conspiracy between Coyne and appellants to keep from the surety such knowledge. Therefore, the charge of appellee that such concealment and such conspiracy existed is unfounded. Besides, neither the bond nor any contract required the contractors, or the persons with whom they were contracting to give such notice to the surety; and it is not shown by evidence or otherwise that it was even customary to give a notice of this sort. Yet the circuit judge seemed to think a notice necessary only in case of appellants (Record p. 100). He cited no authorities for his finding and we submit that it can not be supported upon principle or authority. In adjudging that the thirteen other claimants, who had supplied Coyne with materials, were entitled to be paid by the surety, the court evidently did not regard it necessary that *they* should have given notice to the surety that they were furnishing labor and materials to Coyne (Record, p. 86).

But why is it unconscionable to compel the surety to comply with its bond? It agreed to become liable if Coyne did not pay for the labor and materials; appellants took up the work in good faith and the loss was occasioned by no fault on their part. This risk of loss is one which the surety took and for which it received compensation.

It is not material to this case, yet appellee, without testimony to warrant it, states that appellants "connived with Coyne" to prevent such taking over of the work. No testimony to establish connivance was taken.

Appellee's counsel refer to the circuit court's opinion, where the court says that the cost of work was increased and that the "claim was not in many respects satisfactorily proved." Counsel also assert that the claim is fraudu-

lent; also say that the monthly estimates made by the engineers show that the labor and supplies furnished by the appellants was worth only about one-half of what appellants now claim. In fact, the counsel use considerable space in their brief to prove that the claim is padded or excessive.

The truth is, that the claim as allowed by the master is shown by undisputed facts to be correct and the contention to the contrary was abandoned by the counsel when they entered into a stipulation as to the parts of the Record to be printed for this court. That stipulation recites that the items of the claim may not be printed and further recites that the account to be omitted from the printing contains the items of all alleged materials, with the dates upon which they were supplied and the amounts and prices thereof, also the alleged names of the laborers, the number of days and hours they worked and the amounts they earned (Record, p. 139). In view of this stipulation, counsel should not now attempt to dispute the accounts. It can hardly be expected that this court would inquire into the correctness or incorrectness of any of the items of an account which the parties have stipulated it is not necessary to have before the court.

The agreed order of reference provides that claims might be filed, with the affidavit of the claimants, but the right to take further proof, as in equity cases, was reserved to the parties. Appellants' claim was filed and supported by the affidavit of R. P. Prowell. Subsequently appellee took the deposition of Mr. Prowell, and he again proved the correctness of the account. There is nothing in this record contradicting his evidence. If the appellee had seriously disputed the account it could easily have called as witnesses the bookkeeper, who actually kept the accounts, the time-keeper of the laborers and the parties who furnished the materials. It is a significant fact that no witness attempted to say that the laborers were not employed, or that the materials were not furnished.

We submit further that counsel was not justified in saying that the engineer's estimates show the value of the material and labor furnished by appellants when the estimates are not in evidence. Even if such estimates

were in the Record, they were estimates based upon prices fixed in the contract with the Government and do not show what the work actually cost Hardaway & Prowell.

The circuit court said that there was reckless disregard of the surety's rights and that this general fact shines through the contract of June 2, 1903. It will be remembered that Coyne, to quote from appellee's brief, "had gone broke;" that he was in debt to his laborers and supply men; that the surety might be ultimately required to pay all these debts, to say nothing about the responsibility which the surety might be forced to assume for loss on account of the completion of the work. Under these circumstances, appellants agreed to take up the work for a compensation of 15 per cent., amounting to about $7,500.00, for a year and a half's services. We suggest that these facts show that the surety's interest was not disregarded at all. In fact, the parties believed they were protecting the surety, for the contract provides that the Government funds should be applied to the satisfaction of the very claims which the surety guaranteed should be paid. The parties believed that the reserve and monthly checks would be more than sufficient to discharge all obligations and thus release the surety. Coyne expected to receive a surplus (Record p. 92).

Counsel states that Hardaway does not know whether or not $8,000.00 advanced by him in the progress of the work was ever repaid to him. Such question was not asked Hardaway and he did not testify upon the subject.

They say that Prowell can not tell what money he spent. He gave the dates and the amounts spent and the master reported them. (Record, 139—Stipulation.)

Appellee's counsel seem to misapprehend the meaning of Tennis Bros. Co. v. Wetzel & T. Ry. Co. That case decides the following points, applicable to the case at bar:

First, that superintending work is performing labor.

Second, that employing labor and paying for it with money advanced by themselves was in law supplying labor. Counsel for appellee misstate the contract in that case when they say it required pay-rolls to be submitted to the railroad company for approval and payment every third day. What the contract did require was: "The party of the first part (Tennis Bros. Co.) agree to employ and

pay for all labor necessary in the construction of said electric railway and to render bi-weekly bills at cost for said labor to party of the second part."

Third, that case further holds that where the labor was supplied at cost, plus 10 per cent., it was as much the supplying of labor as it would have been if Tennis Bros. Co. had agreed to furnish the labor for a fixed price.

Counsel argue that the surety is entitled to subrogation or, more correctly speaking, to the right to recoup from all of the contractors whatever it may have to pay to the laborers and materialmen. Undoubtedly that is the law; but they seem to think the surety can not hold Willard & Cornwell for amounts which they pay for labor and materials supplied to Coyne alone, and this we submit is a misapprehension; for, manifestly, Willard, Cornwell and Coyne could not make an agreement between themselves, without the knowledge or consent of the surety, whereby the surety's right to recourse on all of them would be affected. For example, under a judgment of the circuit court, the surety has paid about $13,000.00 to parties who supplied labor and materials to Coyne alone. Can there be any doubt that the surety has recourse upon all of the contractors for the sum thus paid?

Counsel assert that an agreement was "foisted" upon the surety, whereby appellants were not liable for loss due to their own mismanagement of the work. The answer is, no such agreement was made, and, as a matter of law, appellants could not recover for any loss which they might sustain by reason of their own mismanagement. They could not hold Coyne, nor were they authorized to use the funds he transferred to them to reimburse themselves for such a loss. Besides, the appellee's argument is valueless for the reason that it is based on no facts in the Record. No mismanagement is shown.

Counsel for appellee say the laborers employed by appellants and the parties who furnished materials to them have been paid by appellants, and, therefore, the persons furnishing labor and materials being satisfied, there can be no recovery by appellants. The truth is all the materials have not been paid for, as appellee's counsel show near the end of their brief; $5,055.26 still remain unpaid. How would the counsel deal with a situation where persons sup-

plied materials partly from a stock already on hand, partly from purchases made on credit, and partly from purchases made for cash? The inference from their argument is that such persons would be considered as supplying only the materials bought on credit—which, of course, is not tenable.

Counsel say that the bank account of appellants is the only proof of expenditures. The itemized pay-rolls show what was expended for labor and the itemized claim for materials, taken from the account books, give each item of materials. Besides, the correctness of this claim is testified to by R. P. Prowell and not contradicted by any one.

Counsel argue that appellants' account can not be correct, because they say that Mr. Prowell testified that the bank account would show the amount of his disbursements and receipts. But Mr. Prowell did not say that the bank account of $57,410.59 was all for labor and materials. Appellants were operating a commissary, and many of these disbursements were for commissary goods. Mr. Fitts interrogated Prowell as follows:

> "Q. Then does the journal include all the items going to make up the $57,410.59 shown on the bank statement?
>
> "A. It does.
>
> "Q. Will you file this journal in court?
>
> "A. That will be submitted to the commissioner.
>
> "Q. Then the amount of $57,410.59 includes every disbursement made by Hardaway & Prowell during the progress of this work on all accounts?
>
> "A. All accounts.
>
> "Q. How much of the last-named sum of money was paid out for merchandise as distinguished from material entering into the physical construction of the lock?
>
> "A. $6,939.18." (Record, p. 52.)

Thus Mr. Prowell showed that the bank account of $57,410.59 covered $6,939.18, which was not for labor and materials going into the work. Then, too, he filed, during the same examination, "Exhibit No. 1," showing that his claim was for $50,373.39 for labor and materials, and in that exhibit he states that this was the purchase cost (Rec-

ord, pp. 105-6). He could never have intended to say that the bank account, amounting to $57,410.59, represented the cost of labor and materials, when he was then filing a detailed statement from his books, fixing the total cost of such labor and materials at $50,373.39, and was expressly testifying that this sum for labor and materials was correct.

CONCLUSION.

We submit that the *Circuit Court* erred in holding that appellants were assignees of the Government contract; that the *Court of Appeals* erred in deciding that appellants were lenders of money to Coyne; also in holding alternatively that appellants agreed to finish the work for the unearned checks and have been paid in full. If we are right in this, the appellants are entitled to $32,757.34, allowed by the master, with interest from March 1, 1906—the day to which he computed interest—at the Alabama rate of 8 per cent.

If the circuit court or the Court of Appeals did not thus err, then we submit that appellants should recover:

First, $8,176.75 reserved by the Government and subsequently paid into court with 8 per cent. interest from February 24, 1905, the day the claim was filed with the master.

Second, $825.90 retained by Coyne from the Government's monthly check, with 8 per cent. interest from February 24, 1905.

Third, $7,556.00, being the 15 per cent. compensation agreed to be paid to appellants for their services, with 8 per cent. interest from February 24, 1905, the day the claim was filed in the cause, the filing before the master being "the full equivalent of the rendition of a stated account." 68 Fed., 115.

Respectfully submitted,

TEMPLE BODLEY,
Counsel for Appellants.

JOHN BRYCE BASKIN,
J. MANLY FOSTER,
W. B. OLIVER,
Of Counsel.

HARDAWAY *v.* NATIONAL SURETY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 44. Argued December 8, 1908.—Decided January 4, 1909.

One who furnishes money and superintends the completion of work under a government contract is not a subcontractor within the meaning of the act of August 13, 1894, c. 280, 28 Stat. 278, and is not entitled to recover a deficit from the surety; and where there is no liability of the contractor there can be no recovery against the surety on the contractor's bond.

The right of the surety on a bond for performance of a contract given under the act of August 13, 1894, c. 280, 28 Stat. 278, to be subro-

gated to the contractor's claim for balances due from the Government, is superior to that of one advancing money to the contractor on assignment of such claim. *Prairie State Bank* v. *United States*, 164 U. S. 227.

150 Fed. Rep. 465, affirmed.

THE facts are stated in the opinion.

Mr. Temple Bodley and *Mr. John Bryce Baskin*, with whom *Mr. J. Manly Foster* and *Mr. W. B. Oliver* were on the brief, for appellants.

Mr. William W. Watts and *Mr. Henry Fitts*, with whom *Mr. William J. Griffin* was on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Appeals for the Sixth Circuit affirming a decree of the Circuit Court of the United States for the Western District of Kentucky, whereby the appellants Hardaway and Prowell were denied the right to recover against the appellee, the National Surety Company, as surety for the faithful performance of a certain contract entered into on September 28, 1899, between the United States and a firm of contractors composed of James E. Willard, Charles L. Cornwell and Joseph Coyne, doing business as Willard & Cornwell. The contract was for the construction of a lock and dam No. 4, in the Black Warrior River, near Tuscaloosa, Alabama. Bond was given in accordance with the requirements of the act of Congress approved August 13, 1894, c. 280, 28 Stat. 278, in order to secure the faithful performance of the contract.

The contract has been kept so far as the United States is concerned, and the surety is relieved from obligation in that respect. The contention in this case involves the construction and application of that condition of the bond, which requires

the contractors to "promptly make full payments to all persons supplying them labor or materials in the prosecution of the work, provided for in said contract."

The question for consideration here is, under the circumstances of the case can Hardaway and Prowell recover upon the bond on their claim as for labor done and material furnished within the terms thereof? The record discloses that the original contractors carried on the work until February 5, 1901, when they made an agreement between themselves and Coyne, by which agreement Coyne was to pay the debts of the firm, to make all future purchases in his own name, and to receive all profits from the contract. After February 5, 1901, Coyne carried on the work. The Government made the checks payable to Willard and Cornwell as before, in accordance with the terms of the contract. On June 2, 1903, Coyne having become financially unable to complete the contract, made a contract in writing with Hardaway and Prowell, which we shall hereinafter set out in full, concerning the work.

Owing to freshets and washouts, as is contended by appellants, it became necessary to do over much of the work, and after its completion appellants made a claim for $32,757.34, interest included to March 1, 1906, and included therein $7,556, being fifteen per cent of the cost expended on the contract with Coyne.

On October 24, 1904, the National Surety Company, appellee, filed a bill in the United States court at Louisville, averring the insolvency of the contractors, and that there would be a loss for labor and material which it would be compelled to pay as surety on the bond, asking for an injunction and the appointment of a receiver. On November 8, 1904, an order was made referring the case to a special master, and providing that parties having claims for labor and materials might prove the same with the right to contest them, and to take the proofs thereof as in equity cases. The order provided that appellee, the surety company, should pay into court, in satisfaction of the claims and costs of action, such a

sum as might be required after the Government payments were exhausted.

The claim of Hardaway and Prowell was filed. A special master allowed the claim. Upon error the Circuit Court disallowed the same, and upon appeal to the Circuit Court of Appeals for the Sixth Circuit the decree was affirmed. 150 Fed. Rep. 465; *S. C.*, 80 C. C. A. 283. The case then came here.

The case turns upon the construction of the contract between Coyne and Hardaway and Prowell. The contract reads as follows:

"State of Alabama, Tuscaloosa County:

"This contract, made this 2nd day of June, 1903, by and between B. H. Hardaway and R. P. Prowell, hereinafter called Hardaway & Prowell, as parties of the first part, and Joseph Coyne, as party of the second part, witnesseth:

"That, whereas, Willard & Cornwell, a firm composed of J. E. Willard, C. R. Cornwell and the said Joseph Coyne, did, heretofore, on to-wit, the — day of —, 1899, enter into a contract with the United States for the construction of lock No. 4 in the Black Warrior River above Tuscaloosa, Alabama, and whereas, shortly after the beginning of the work upon said lock the said Joseph Coyne, by an arrangement between him and his copartners, undertook to complete and finish said lock according to the specifications of the contract of said firm with the United States, and in consideration of such an undertaking acquired the beneficial interest of said firm in said contract and was to receive all amounts paid by the United States in consideration of such contract, and whereas, said lock is still uncompleted, and the said Joseph Coyne cannot, on account of his inability to procure the necessary financial aid, and on account of the disorganization of his labor forces and for various and sundry other reasons, complete and finish the said work in accordance with the said contract, and whereas said contract is a valued asset to the said Joseph Coyne if the said work can be prosecuted to its

completion under the terms of said contract, there being held in reserve by the Government under the terms of said contract about $8,300.00, which has already been earned by said Coyne, and whereas by reason of his said inability to finish said work the said contract is about to be forfeited, and the said Coyne is in imminent danger of losing, not only what profits may be made upon the completion of the work, but the entire reserve fund also retained by the Government, and whereas the said Joseph Coyne for the purpose of preventing the forfeiture of said contract, has made overtures to the said Hardaway & Prowell to take up said work and complete it, and the said Hardaway & Prowell have agreed to do so upon the terms and stipulations hereinafter set forth; now, therefore,

"1. The said Hardaway & Prowell do hereby undertake and agree with the said Joseph Coyne to superintend the completion of the said lock and dam No. 4 and to furnish the necessary finances for the completion thereof, and to put in charge of said work a competent superintendent and to properly organize the work for an energetic prosecution thereof to completion, for which services they are to receive an agreed compensation of 15 per cent upon the total cost of completing said contract, which total cost shall be construed to include all amounts necessarily expended and expenses incurred by Hardaway & Prowell in the completion of said work and all amounts necessarily paid and expenses incurred by them to effect a settlement with and an acceptance of said lock and dam by the United States.

"2. The said Joseph Coyne agrees to the above compensation for Hardaway & Prowell and further agrees to turn over to them entire charge of the completion of said work, and not to interfere with them in any way in the prosecution of said work to completion, and further agrees to turn over to the said Hardaway & Prowell the entire outfit of machinery, tools, etc., which he now has at said lock and dam and the quarries where he is getting stones and to give the use of the same to them for the completion of said work free of any charge.

"3. The said Joseph Coyne further agrees to have all checks for each estimate upon said work forwarded by the Government to the said Hardaway & Prowell and to properly endorse such checks so that they may be collected by Hardaway & Prowell.

"4. It is further agreed by all parties hereto that out of the proceeds of the checks referred to in the next foregoing paragraph the obligations shall be paid preferentially in the following order:

"1. The compensation of the said Hardaway & Prowell as herein agreed for their services.

"2. All moneys advanced by Hardaway & Prowell and used in the prosecution of said work.

"3. All debts necessarily incurred by the said Hardaway & Prowell for the prosecution of said work other than debts for labor and material.

"4. All debts incurred by said Hardaway & Prowell for labor and material or moneys advanced by them in payment for labor or material debts.

"5. The said Joseph Coyne, for the completion of said work and for the securing to the said Hardaway & Prowell all amounts that they shall have to pay on whatever account for the completion of said lock and dam and for a settlement with the United States and acceptance of said lock and dam by the proper authorities of the government, does hereby assign and set over to the said Hardaway & Prowell all his interest in the amount, aggregating as aforesaid about $8,300, retained and now held in reserve by the Government under the said contract for the building of said lock and dam, which shall be applied by the said Hardaway & Prowell in the following order:

"1. To the payment of all debts for labor and material incurred in the building of said lock and dam.

"2. Any balance that may be due to said Hardaway & Prowell for their compensation under this contract.

"3. All other necessary debts incurred in the prosecution

of the said work by Hardaway & Prowell and all amounts including expenses which they shall have to pay in order to effect a settlement with the Government and acceptance by it of said lock and dam.

"4. Any balance to be paid to the said Joseph Coyne.

"6. It is understood and agreed by all parties hereto that if the said Joseph Coyne should at any time fail or be unable to turn over to the said Hardaway & Prowell the checks for estimates on said work properly endorsed so that Hardaway & Prowell can collect them or should fail to secure the collection of them by the said Hardaway & Prowell then the said Hardaway & Prowell shall in that event have the option of annulling said contract and stopping work without notice to the said Joseph Coyne, or to any other parties whomsoever, but in said event the said Hardaway & Prowell shall have a claim against the said Joseph Coyne for all moneys furnished by them and expenses incurred by them upon any account whatsoever in the prosecution of said work, and which shall not have been repaid to them, and for all compensation earned under this contract and not paid to them, and such claim shall be due and payable at once upon their termination of the contract.

"In witness whereof the said parties of the first and second parts have hereunder set their hands and seals in duplicate, this the day and year first above written.

"B. H. HARDAWAY.
"R. P. PROWELL.
"Attest: C. B. VERNER. "JOSEPH COYNE."

It is said that the master sustained the claim of Hardaway and Prowell upon authority of the case of *Hill* v. *Surety Co.*, 200 U. S. 197. In that case this court held that the obligation of a bond similar to the one here in suit, when construed in the light of the statute requiring its execution, and looking to the protection of those who supply labor and materials provided for in the original contract, was broad enough to in-

clude laborers who had performed work for a subcontractor who furnished labor or material which the original contractor had obligated himself to furnish. It was held that in such a case the original contractor who employed a subcontractor who bought materials or hired labor with which to carry out and fulfill the engagement of the original contract for the construction of a public building was thereby supplied with materials and labor for the fulfillment of his contract as effectually as if he had directly hired the labor or bought the materials. We are unable to see how that case controls the one at bar; nor can we reach the conclusion that Hardaway and Prowell were subcontractors furnishing labor or materials to the original contractor, or furnishing such labor or materials to subcontractors which enabled the original contract to be fulfilled, thereby bringing themselves within the principles of the *Hill case*. As we read this contract, Hardaway and Prowell, in view of Coyne's financial and other difficulties, undertook to do certain things in relation thereto. They undertook to superintend the completion of the lock and dam, and to that end to furnish the necessary finances for the completion of the work; for this they were to receive an agreed percentage upon the total cost upon the completion of the contract.

Coyne, on his part, agreed that such compensation should be paid, and agreed to turn over the charge of the work to Hardaway and Prowell and not to interfere therewith in any way, and to give them the use of his outfit and tools, etc., and the quarries from which he was taking stone for the construction of the lock and dam. He agreed to have the checks given by the Government, upon estimates, forwarded to Hardaway and Prowell, and to properly indorse such checks so as to make them collectible by them.

The manner in which Hardaway and Prowell should distribute the money received from such checks is specifically provided in paragraph 4 of the contract. By the fifth paragraph Coyne assigned to Hardaway and Prowell for the completion of the work, and as security to Hardaway and Prowell,

for the amount which they should have to pay on all accounts for the completion of the work and for a settlement with the United States and acceptance of said lock and dam by the proper authorities, all of his interest in $8,300 retained and held in reserve by the Government under the contract, which was to be applied by Hardaway and Prowell, 1st, for the payments of debts for labor and materials; 2d, any balances due to Hardaway and Prowell for their compensation under the contract; 3d, all other necessary debts incurred in the prosecution of the work by Hardaway and Prowell and all amounts which they shall be obliged to pay in order to effect a settlement with the Government and acceptance by it of said lock and dam; 4th, any balance to go to Coyne.

The sixth paragraph of the contract made provision for the possibility that Hardaway and Prowell should not receive payment of the checks coming from the Government, in which event they should have the right, at their option, of annulling the contract and stopping the work. In that contingency they should have a claim against Coyne for money furnished by them on account of the prosecution of the work and for all compensation earned under the contract.

Hardaway and Prowell bound themselves to furnish superintendence and to furnish the money to complete the work which Coyne had undertaken to do. These things were all that Hardaway and Prowell undertook to do; they were not subcontractors in our view who undertake to furnish labor and materials upon a contract with the original contractor. The extent of the agreement was to furnish funds to complete the work and to superintend it. For this they were to be paid by the assignment of the reserve funds in the hands of the Government and the checks or payments under the original contract. There was no undertaking on the part of the surety company that the contract should be profitable to its principal or to any other substituted in the contract by assignment or otherwise. The surety did agree by the terms of the bond that the original contractors should make full payment to all per-

sons supplying them with labor and materials in the prosecution of the work. This was for the protection of the subcontractors and others supplying such labor and materials for the fulfillment of the original agreement, as we held in the *Hill case*.

We agree with the Circuit Court of Appeals that Coyne entered into no agreement to pay Hardaway and Prowell beyond the assignment of the checks from the Government and the assignment of the reserved $8,300. This is shown by the terms of the agreement read in the light of the circumstances surrounding the parties at the time the contract was made. Coyne had failed to complete the contract and was financially embarrassed. Hardaway and Prowell looked to the assignment of the reserve fund from Coyne and the payments from the Government for their commissions, not to the personal liability of Coyne. Coyne was to be personally liable only in the event that Hardaway and Prowell should fail to realize on the Government checks, as provided in paragraph 6 of the contract. As the claim of Hardaway and Prowell set up in this case must be worked out against the surety because of the liability of the principal in the bond to them, and as there is no such liability either from Willard and Cornwell or Coyne to them, there can be no recovery against the surety on the bond.

Nor do we think that Hardaway and Prowell can complain of the disposition of the $8,300 (exactly $8,161.75), reserved payments under the contract. This sum was paid into court for work done previous to the making of the contract of June 2, 1903. 80 C. C. A. 291. The Circuit Court of Appeals held that this sum, thus paid into court, should be credited upon the $13,261.76, which the surety company had been directed to pay into court for the satisfaction of labor claims which had been proved and allowed in the case. The right of the surety to be subrogated had attached to the fund and was superior to any rights which Hardaway and Prowell had as assignees of Coyne. *Prairie State Bank* v. *United States*, 164 U. S. 227.

We think this was the correct view. We find no error in the decree of the Circuit Court of Appeals, and the same is

Affirmed.